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IN THE

Supreme Court of the United States

October Term, 1984

CABLE NEWS NETWORK, INC.
Petitioner,

v.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

May all audio-visual coverage of all federal trials be absolutely and unconditionally forbidden by an administrative rule unwaivable even by the unanimous consent of the participants and the trial judge?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cable News Network, Inc.* petitions for a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the Second Circuit entered November 2, 1984, affirming decisions by the respondents denying audio-visual coverage of the civil defamation trial in *Westmoreland v. CBS, Inc.* (S.D.N.Y., 82 Civ. 7913) and upholding a complete ban on all such coverage of federal civil trials.

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*The list of parent companies, subsidiaries and affiliates of Cable News Network, Inc. required by Rule 28.1 of the Supreme Court Rules is set out in the Application For Extension Of Time In Which To File Petition For Certiorari, filed by Cable News Network, Inc. on January 9, 1985. That list remains accurate.

I.
OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is not reported. It appears in the appendix at A1. The decision of the Respondent Board of Judges is not reported. It appears in the Appendix at A28. The initial decision of the Respondent United States District Court (per Judge Pierre N. Leval) is reported at 596 F. Supp 1166. It is reprinted in the Appendix at A21. The decision of Judge Leval denying reconsideration appears at A29.

II.
JURISDICTION

The decision and judgment of the Court of Appeals were entered on November 2, 1984. No petition or suggestion for rehearing has been filed. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). On January 10, 1985, the Circuit Justice for the Second Circuit extended the time within which to file this petition to March 2, 1985. (A58).

III.
CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

A. Constitutional Provisions

The First Amendment:

> "Congress shall make no law . . . abridging freedom of speech, or of the press. . . ."

The Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

B. Statutes

28 U.S.C. §§ 2071 and 2072. The text of these sections is set out in Appendices H and I, respectively.

C. Rule

General Rule 7 of the United States District Court for the Southern and Eastern Districts of New York:

> "The taking of photographs and the use of recording devices in the courtroom or its environs, except by officials of the court in the conduct of the court's business, or radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings or otherwise, whether or not the court is actually in session, is prohibited."

IV.
STATEMENT OF THE CASE

At issue in this case is the validity of a sweeping, categorical ban on *all* audio and visual coverage of *all* federal trials—a ban that the Second Circuit Court of Appeals upheld without regard to its extension to historical as well as live uses, and despite the consent of all parties and the unchallenged finding of the trial judge that the proposed "filming and telecasting need not interfere in *any degree* with fair and orderly administration of justice" (A23) (emphasis added).

That the ban admits of no exception for civil trials of historic public interest and unusual importance could hardly be clearer, for it has been applied to the trial in *Westmoreland v. CBS, Inc.*—a trial that raised, in the words of presiding Judge Pierre Leval, "profoundly important questions concerning this country's conduct of the war in Vietnam and the privileges, ethical responsibilities and liabilities of the press" (A22). It is un-

disputed that, as Judge Leval noted, "the subject matter of this trial is of the most serious public importance" (A25), and indeed that, of the trials that might ever be eligible for exemption from the ban at issue here, this one posed what the Court of Appeals assumed to be "the paradigm case for televising a federal trial." (A3). Thus it is not only the right to cover *this* trial—which has now been settled by a stipulated dismissal[1]—that is implicated here: if *this* trial may be placed off-limits to all television coverage, however unobtrusive and however acceptable to all participants, then so may *every* trial.[2]

Petitioner Cable News Network, Inc. ("Cable News") is the nation's only 24-hour television news network. Petitioner's programs reach more than one-third of all television households[3]

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[1] Following the decision of the Court of Appeals, the parties in *Westmoreland v. CBS* stipulated to a dismissal of the suit on February 18, 1985. (A54). The conclusion of the *Westmoreland* trial does not moot this issue. This Court has consistently held in trial closure cases that its jurisdiction is not defeated simply because the order attacked has expired or because the trial has ended, "if the underlying dispute between the parties is one 'capable of repetition, yet evading review.' " *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982). Petitioner, as a national all-news network, will undoubtedly be denied access to other federal trials on the basis of the *per se* rule at issue here, either in the Southern District of New York or in any of the myriad district courts that have analogous local rules. *See id.; Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (plurality opinion); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377–78 (1979). *See also* footnotes 2 and 17 below.

[2] Of the ninety-four United States District Courts, eighty-one currently have rules substantially identical to General Rule 7 of the Southern and Eastern Districts of New York. The courts without such a rule are scattered across the country in such states as Alaska, Georgia, Indiana, Tennessee, Vermont and Texas. *Federal Local Court Rules*, Callaghan & Co. (November, 1984).

[3] As of February, 1985, Cable News reached more than 31 of the 84 million homes served by television, an increase of 14% over the 27 million homes it reached in August, 1984. *See* Cablevision, February 25, 1985, p. 44 and Broadcasting—Cablecasting Yearbook 1984, C-205.

and, as the Court of Appeals noted, "its operations are supported by extensive experience in providing comprehensive live coverage of court trials." (A4). Since its establishment in 1980, Cable News' philosophy has been to cover news events as they occur, not for a few minutes, but thoroughly, continuously, and in depth. Petitioner believes that only extended, live television coverage can provide the full measure of reporting integrity uniquely available in the television medium. Where a ban on television coverage is so sweeping as to exclude both the real-time telecasting of events and the audio-visual recording of those events for later retrieval, Petitioner is convinced that, as a practical matter, the events in question have been permanently obscured from genuine public observation.

Accordingly, on August 21, 1984, Cable News petitioned the district court for permission to provide comprehensive, regulated television coverage of the *Westmoreland* trial. The technical elements of Cable News' methods and the proposed guidelines for coverage were drawn from its experience in telecasting hundreds of hours of judicial proceedings and from the findings and conclusions of the 41 state courts that permit audio-visual coverage of their proceedings.[4] The trial judge would hold plenary power to regulate coverage activity in the courtroom.

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[4] Cable News proposed to locate one, fixed tripod-mounted camera and a still cameraman in an approved, specified place in the courtroom. A sound technician would be necessary to assure that no bench conferences or other confidential conversations were monitored. The equipment would emit no light or sound of any kind. The still photographer would use two cameras that have been approved by state courts for their quiet operation. All personnel would be stationary and dressed respectfully; they would wear no identifying logos. They would not change or move equipment while the court was in session. All coverage would be pooled and all participating media would be required to agree to comply with the regulating guidelines. The audio-visual products of coverage could not be used by the parties in any phase of the case; and there could be no appeal by anyone of the trial judge's decisions under the guidelines. After trial, Cable News would provide tape copies and reports concerning the coverage as requested by the court.

Despite his initial "instinctive negative reaction" (A22), predicated on an impression that television was "low-brow," "vaudeville" entertainment, *id.*, Judge Leval, in his Opinion and Order of September 19, 1984, ultimately concluded that the petition "should be granted" (A27):

> [The] [c]ameras are small, noiseless and equipped with distance lenses. Modern technology has made film that is sensitive to ordinary indoor light, and sound recording is similarly advanced. It appears that filming can [now] be done without the slightest obstruction of dignified, orderly court procedure. (A22).

Judge Leval specifically found that Cable News' equipment would be "no more intrusive than the familiar phenomena of courtroom artists working on their sketches and notetaking reporters making entrances and hasty exists to phone in their stories on deadline." (A23). Indeed, television had already, in a sense, entered the *Westmoreland* courtroom: the courtroom was filled with video recording machines, wiring, speakers, monitors and other TV equipment for the presentation of videotaped evidence for 55 of the estimated 300 hours of trial.

Judge Leval found that the "rare possibility" (A23) of a case in which live broadcasting might prejudice the outcome of the trial or compromise some other interest of constitutional magnitude did not justify a blanket exclusion of cameras from the courtroom. (A23–24). Such dangers could be dealt with as they arose, on a case-by-case basis. *Id.* The "monitoring presence of the camera" would far more often be salutary, ensuring "that witnesses tell the truth and that the court does not influence the jury by gesture, expression and tone." (A24).

Television broadcast of the *Westmoreland* trial would be particularly appropriate, the district court found, because the questions in dispute included whether the U.S. military command in Vietnam engaged in willful distortion of intelligence data, and whether one of the nation's most important distributors of news and commentary engaged in willful or reckless slander. "The public interest is thus not the mere voyeurism

that emerges for a sensational murder trial." (A25). Indeed, since the "historians and commentators on the war and on the press will not accept the verdict of the jury and the rulings of the judge as definitive answers" (A25), the filming and broadcasting of the trial "is more important than its decision," *id.*[5] Judge Leval found that banning cameras from the courtroom "effectively precludes the public at large from gaining any meaningful acquaintance with the conduct of court business." (A24). That was hardly a surprising finding, for the *Westmoreland* courtroom could accommodate only 150 spectators, and all but 70 of the available seats were set aside for representatives of the news media. Thus, for all but those fortunate few, the opportunity to realize the First Amendment right of access to trials "effectively does not exist today." (A25).

Despite these findings and "in spite of its merit" (A27), Judge Leval denied Cable News' application, ruling that General Rule 7 of the United States District Court for the Southern District of New York prohibited cameras in the courtroom and left him no discretion to do otherwise.[6]

On appeal[7] from the district court's decision,[8] Cable News

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[5] The stipulated dismissal of the *Westmoreland* suit assures that the *only* verdict ever rendered in this case will be that rendered by history.

[6] The Court also noted that broadcast coverage was barred by Canon 3A(7) of the Canons of Judicial Conduct for United States Courts. (A22). That Canon (A45) has led to the adoption of local rules barring broadcast coverage of trials by nearly all of the federal district courts. *See* footnote 2, *supra*.

[7] Judge Leval denied Petitioner's motion for reconsideration on September 28, 1984. Cable News' petition for a waiver of General Rule 7 was denied by the Board of Judges for the Southern District of New York on October 1, 1984. (A28). Cable News' petition for a writ of mandamus was denied by a panel of the United States Court of Appeals for the Second Circuit on October 4, 1984. (A7).

[8] Two members of the appellate panel also considered Cable News' appeal from the denial of a waiver of Rule 7 by the Board of Judges. (A6–7). In his separate opinion, Judge Winter indicated his view that this portion of the appeal was improper and should be dismissed. (A17 n.14.)

argued that application of the *per se* prohibition of General Rule 7 exceeded the authority of the respondent court and judges, violated the litigants' First Amendment rights to reach the public at large, and violated the First Amendment and common law rights of the public and the media to full access to events in the courtroom. A panel of the United States Court of Appeals for the Second Circuit affirmed.

A majority of the panel, per Oakes, J., held that the First Amendment was not implicated in any way by the flat ban on cameras in the courtroom. (A15). The court conceded the existence of a First Amendment right of access to civil trials (A12–13), and the benefits of public observation of the judicial process, *id.* Nor did the Second Circuit question the district court's finding that Cable News' proposed coverage would be likely to enhance, rather than to disrupt or to prejudice, the course of justice in the proceeding at issue. It understood Petitioner's proposed guidelines to "have been reasonably tested in the state courts and [to be] narrowly tailored to achieve unobtrusive distribution of audio-visual coverage" (A4), and noted that the guidelines "follow those reviewed in *Chandler v. Florida*, 449 U.S. 560, 566 (1981)" (A5 n.2). It was prepared as well to assume that *Westmoreland* presents the "paradigm case for televising a federal trial." (A3). It recognized that "the public's right to receive information may not be vitiated by appeals to the availability of alternative means for receipt of the information" (A12); and it acknowledged that the First Amendment protects "the *communication*" itself (A12) (emphasis added). The Court of Appeals nonetheless upheld the sweeping ban of General Rule 7, solely on a conclusion that the First Amendment guarantees only "a right to *attend* trials, not a right to view them on a television screen" (A13) (emphasis in original).[9]

In a separate opinion concurring in the result, Judge Winter flatly disagreed with the majority's holding that "the public

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[9] Neither opinion below addressed Petitioner's argument that Rule 7 infringed its common law right of access to the trial, in violation of the Rules Enabling Act, 28 U.S.C. Section 2072.

interest in television access to the courtroom does not now lie within the First Amendment." (A15–16). He reasoned that, since the media must be permitted access to the courtroom, "particular forms of access may be barred only on a time, place and manner theory." (A17). But, believing that "a case-by-case rule will likely evolve into a presumption in favor of television" (A18), Judge Winter concluded that a "reasonable belief" in the "potentially undesirable effects of television" (A20) in even a few cases suffices to overcome the First Amendment and to justify a categorical ban on coverage of *all* trials—a ban which he considered only as applied to live coverage.[10]

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[10] In his concurring opinion, Judge Winter expressed the view that a ban on filming for historical purposes was not before the court. (A19 n.15). The majority expressed no such reservation. On its face, neither the rule upheld (*supra*, p. 3) nor the judicial canon from which it is derived (A45) suggests any exception based on educational or historical use, or on the time at which the material would be released. Nor could any exception based on delayed release be reconciled with the majority's rationale that the First Amendment is not implicated by a TV ban so long as a handful of the public may physically attend the trial. Further, although the intention of Cable News was to provide comprehensive live coverage rather than excerpts of the trial, the broadcast material could of course be put to that use by other members of the media pool with whom Petitioner's coverage would have been shared. It is therefore beyond cavil that this case squarely presents not only the validity of a categorical ban on live coverage, but also the validity of an equally categorical ban on taping trials for later use by students of the law or of the underlying events. Inasmuch as there is no suggestion that live coverage of this trial would have entailed dangers distinct from those that delayed release would pose, there is no reason for the Court to await a case in which the sole intent of the network involved is to create an audio-visual historical record—even if the Court were inclined to conclude that *only* such historical or educational coverage is generally protected by the First Amendment.

V.
REASONS FOR GRANTING THE WRIT

A. THE JUDGMENT BELOW TRIVIALIZES AND ANACHRONIZES THE FIRST AMENDMENT RIGHT TO OBSERVE TRIALS RECOGNIZED BY THIS COURT IN *RICHMOND NEWSPAPERS v. VIRGINIA*.

1. The Judgment Below Trivializes The Right To Observe Trials By Holding That This Right Includes Only The Chance To Be Physically Present In The Courtroom.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court recognized that the press and public have a right of access to criminal trials under the First Amendment.[11] If a criminal trial is a "public event,"[12] even when the parties wish to prevent members of the public from observing,[13] then the same necessarily follows *a fortiori* in cases such as this, where we deal with willing speakers and with the public's correlative right to listen[14]—a right held by ordinary citizens no less than by students of history. "What transpires in the

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[11] *Id.* at 575–76 (plurality opinion by Burger, C.J.); *id.* at 585 (Brennan, J., concurring in judgment); *id.* at 599 (Stewart, J., concurring in judgment); *id.* at 604 (Blackmun, J., concurring in judgment); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603–04 (1982).

[12] *Richmond Newspapers, supra*, 448 U.S. at 573 n.9; *Craig v. Harney*, 331 U.S. 367, 374 (1947) (Douglas, J.).

[13] *Richmond Newspapers, supra*, 448 U.S. at 580; *cf. Chandler v. Florida*, 449 U.S. 560 (1981).

[14] *See Richmond Newspapers, supra*, 448 U.S. at 580 n.17 (opinion of Burger, C.J.); *id.* at 596–97 (Brennan, J., concurring in judgment); *id.* at 599 (Stewart, J., concurring in judgment); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Westmoreland v. CBS, Inc.*, No. 84-7809 (2d Cir. 1984) (A12–13).

courtroom is public property."[15] But the bright prospect of open government held forth in the fundamental promise that " 'every citizen should be able to satisfy himself with *his own eyes* as to the mode in which a public duty is performed' "[16] will become a dim guarantee indeed if, as the Court of Appeals has held, the power unobtrusively to extend the sights and sounds of the trial to citizens physically located beyond the courtroom is utterly irrelevant under the First Amendment.

If *Richmond Newspapers* and its progeny protect merely the right of a few public attendees to be physically *present* within the courtroom itself, there could be no First Amendment objection even to devices calculated to prevent those who are admitted from actually *seeing* and *hearing* much that transpires. Nor could constitutional objections be raised to attempts to reduce the *number* of observers to the few who arrive first (perhaps at government instigation), or even to the deliberate use of "court-packing" or the calculated choice of the smallest possible courtroom—practices reportedly popular in the Soviet Union and elsewhere to prevent coverage by the Western press of sensitive trials. This Court emphatically held, in addressing the application of modern radio technology to crime detection, that the Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). It trivializes the right of trial access to hold, as did the court below, that the First Amendment, unlike the Fourth, protects *places, not people*—that it protects only the paltry privilege of a few to sit amidst bar, bench, and jury box, and not the fundamental right of the many "to listen, observe, and learn" at

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[15] *Richmond Newspapers*, *supra*, 448 U.S. at 573 n.9 (opinion of Burger, C.J.) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)); *id.* at 593 (Brennan, J., concurring in judgment) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

[16] *Gannett Co. v. DePasquale*, 443 U.S. 368, 430 n.10 (1979) (Blackmun, J., concurring in part and dissenting in part) (quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.)) (emphasis added).

first-hand, *Richmond Newspapers*, *supra*, 448 U.S. at 578 (opinion of Burger, C.J.). To hold this is to forget that the First Amendment's "protection . . . is to the *communication*" itself, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 756 (1976).

This case tests directly the fullness of the promise of open justice precisely because no courtroom in the land could possibly accommodate all those who might wish to observe so momentous a trial as that in *Westmoreland v. CBS*.[17] Particularly in this context, second-hand summaries and occasional headlines about the trial are at best opaque reflections of the real events. Exclusion of the instantaneous access to reality that only live audio-visual coverage can provide—and of the complete record of the testimony and the trial as a whole that only audio-visual coverage can preserve—deprives the nation of the "widest possible dissemination of information . . . essential" to its welfare, *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Thus relegating 235 million citizens[18] to the often stale, always filtered reports of a few dozen reporters cannot serve the cherished goal of an "informed public capable of conducting

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[17] The *Westmoreland v. CBS* trial, while unquestionably momentous to the country at large, is hardly unique. Indeed, this Court may take notice of an equally momentous civil libel trial beginning after and concluding before *Westmoreland v. CBS* in the same courthouse: *Sharon v. Time, Inc.*

[18] The ban upheld below denies the chance to witness momentous trials not only to the present population, but also to all posterity. In a trial such as the one to which this ban was applied, the fact that no verdict will ever be rendered by judge or jury makes especially poignant the ban's impact in permanently depriving both the general public and legal and military historians of any chance to see and to hear the witnesses testify. Our ability to grasp the rich texture of our history is impaired by the absence of the "hands-on" experience that would be provided by audio-visual records of such cases as *Dred Scott*, *Brown v. Board of Education*, and *Northern Securities Co. v. United States*. The fact that lack of technology dictated the blank spots in our national memory in those cases should not distract us from the stark challenge to the First Amendment posed by a government ban on telecasting in this age of advanced mass media.

its affairs," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969).

> Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them.

J. Mill, On Liberty 32 (R. McCallum ed. 1947), *quoted in Red Lion*, *supra*, 395 U.S. at 392 n.18. As the trial judge below expressly found, prohibiting audio-visual coverage thus "effectively precludes the public at large from gaining *any meaningful acquaintance* with the conduct of court business" (A24) (emphasis added).[19]

That not every person who wishes to attend will arrange to be physically present, that many may have little or no interest, and that comprehensive coverage by a news network will not always be offered, does not dilute each person's *right* to observe to the degree feasible, and as instantaneously as considerations of judicial integrity and the fair administration of justice permit. This Court has recognized as much in upholding access rights for interested news media as surrogates for the nonattending public.[20] Yet the First Amendment does not relegate a citizen simply to reading about the trial from a printed tran-

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[19] Cable News' extended, live coverage of the trial, by itself, would have reached one-third of all television households. *See* footnote 3, *supra*. With the pooled coverage proposed below, some audio-visual coverage would have been available on virtually every set in the country.

[20] *See, e.g., Richmond Newspapers*, *supra*, 448 U.S. at 573 (opinion of Burger, C.J.); *id.* at 586 n.2 (Brennan, J., concurring in judgment).

script,[21] much less from a newspaper account. Even if compelled resort to such accounts would entail neither temporal delay[22] nor filtering of the crucial information through the hearsay of a third party's reporting, but only a shift from the opportunity to hear and observe directly to the opportunity to read the speaker's words in print, there would nonetheless be a significant abridgment of the First Amendment. As this Court held in *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972), it is wrong to suggest "that the First Amendment is inapplicable" to a claimed interest in seeing and hearing a lecturer in person just "because appellees [had] free access to [the lecturer's] ideas through his books and speeches."[23]

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[21] *Id.* at 597 n.22 (Brennan, J., concurring in judgment). Even if such a written account were both complete and unflawed, such matters as demeanor and credibilty—plainly critical at the trial—would be forever lost if only a cold transcript were available. *See, e.g., NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (per curiam); *see Mincey v. Arizona*, 437 U.S. 385, 410 (1978) (Rehnquist, J., concurring in part and dissenting in part); *Davis v. Alaska*, 415 U.S. 308, 321 (1974) (White, J., joined by Rehnquist, J., dissenting). Not only would a transcript be unable to disclose nonverbal evidence, *see* 3 Wigmore on Evidence Sections 789–798a (J. Chadbourn, ed. 1970); beyond that, it could not convey the element of witness demeanor—an element whose material and often critical role has made trial courts reluctant to award summary judgment on the basis of mere affidavits, *see* 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.11 [1.–2] at 56–200 (1976), and has made appellate courts reluctant to review a fact-finder's assessments of credibility. *See, e.g., United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

[22] *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976); *id.* at 609 (Brennan, J., joined by Stewart and Marshall, JJ., concurring); *Bridges v. California*, 314 U.S. 252, 268 (1941). As the court below recognized in *In re application of National Broadcasting Co. (United States v. Meyers)*, 635 F.2d 945, 952 (2d Cir. 1980), there is "a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence that records the activities of [public officials]. . . . And there is a significant public interest in affording that opportunity contemporaneously with the introduction of the . . . evidence in the courtroom, when public attention is alerted to the ongoing trial."

[23] *Accord, FCC v. League of Women Voters*, 104 S. Ct. 3106 (1984) (striking down congressional ban on TV editorializing by publicly subsidized broad-

Allowing reporters to sit in the courtroom, but not to bring their unobtrusive cameras and recorders with them—whether for real-time coverage or for delayed public observation or, as here, for both purposes—does more than merely vitiate the effectiveness of such reporters as surrogates for the public. It deprives the public of a higher quality of information, for only the audio-visual medium provides a "comprehensive visual element and an immediacy . . . not found in print media," *Cable News Network, Inc. v. American Broadcasting Company*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (recognizing First Amendment right of TV media to be included in White House pool coverage and holding exclusion of TV coverage of press conferences to be First Amendment violation where reporters were permitted to attend those conferences).

Although permitting attendance at trials by a handful of public observers when the wider public is flatly excluded may prevent trials from being altogether *secret*, it cannot substitute for their being meaningfully *open* to the public as a whole. Even if, as this Court recognized in *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819 (1984), one "value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed," 104 S. Ct. at 823, no such vicarious safeguard could possibly satisfy the core purpose of unimpeded public access to civil trials such as this one—a trial as to which the presiding judge astutely observed that actual public observation "of the witnesses' testimony" may be "more important than [the trial's] decision" (A25).[24] This point is made even more poignant by the fact that

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casters notwithstanding the ability of the station owners to express their views in print and notwithstanding any claim to broader government authority over electronic media than over print media).

[24] Openness as a means of assuring *fairness to criminal defendants*, in trials where "[n]o right ranks higher than the right of the accused to a fair trial," *Press-Enterprise Co.*, *supra*, 104 S. Ct. at 823, is therefore distinct from openness as a means of assuring *full information for the public* to the

the *Westmoreland* trial reached no decision—it was resolved by a stipulated dismissal. Thus the *only* verdict will be that of the public and posterity.

Wise legal observers have long perceived the salutary influence of direct observation by as many citizens as possible:[25] Blackstone averred that "open examination of witnesses *viva voce*, in the presence *of all mankind*, is much more conducive to the clearing up of truth." 3 W. Blackstone, Commentaries *373, *quoted in Richmond Newspapers*, *supra*, 448 U.S. at 597 (Brennan, J., concurring) (emphasis added). The same holds true whether the public observes from seats in the courtroom or by means of a video camera—whether in rooms set aside in the courthouse for overflow observers or in living rooms and video libraries across the country. The district court noted that the "monitoring presence of the camera [ensures] that witnesses tell the truth and that the court does not influence the jury by gesture, expression and tone." (A24).[26] The possible existence of occasions when television may adversely affect the

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degree consistent with fairness to all parties. It is the value of a fully informed public that the First Amendment makes central in civil proceedings such as this.

[25] Until the advent of audio-visual recording, this, of necessity, meant *instantaneous* observation by as many as possible. Now, of course, the value of minimizing *delay* can be separated from the value of maximizing *directness;* it is possible to assure direct but delayed observation when simultaneous coverage would for some sufficiently compelling reason be deemed improper. *Cf. Belo Broadcasting Corp. v. Clark*, 654 F.2d. 423, 431 (5th Cir. 1981) (holding that release of audiotapes for copying and public dissemination could be delayed where another defendant had not yet been tried). The ban upheld below, however, makes no such distinctions. *See* n.10, *supra*.

[26] Following extensive study, the Supreme Court of Florida concluded that, to the extent that witnesses and jurors are affected by coverage, they are more attentive. *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 768 (1979). *See also Report of the Pilot Project on Cameras and Electronic Equipment in the Courtroom*, to the Justices of the Louisiana Supreme Court, from Guy E. Humphries, Jr., District Judge, upon the Louisiana Supreme Court's Order of February 23, 1978.

fairness or dignity of a trial merely illustrates not that First Amendment guarantees may be dismissed as wholly inapplicable because the medium involved is in some respects novel, but rather that they must be tailored, in individual cases, to the medium and its effects. *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3121–3126 (1984); *accord Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606–607 (1982).

Limiting access to a trial to the print media alone and to those few members of the public fortunate enough to squeeze into the courtroom denies first-hand, real-time access—and access to a delayed but exact replay—to tens of millions of citizens, all of whom are relegated by such a limitation to qualitatively inferior *interpretations* of what occurred. To be sure, members of the media—print *or* electronic—may claim for themselves no rights of access "greater than those of any other member of the public." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978) (quoting *Estes v. Texas*, 381 U.S. 532, 589 (1965)). But, when television coverage represents the *only* means by which all but a handful of citizens may *ever* exercise the right of access supposedly secured to them by the First Amendment, a ban on all such coverage—regardless of its unobtrusive nature—constitutes something very different from a refusal to accord privileged status to the institutional press.[27] It represents instead a total denial, both at the time of trial and thereafter, of a First Amendment right belonging to every would-be viewer in the country.

Because of this ban on audio-visual technology, as the district court below expressly found, "the opportunity to see how the courts function . . . effectively does not exist today." (A25).

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[27] Indeed, a ban on cameras in the courtroom in a sense *inverts* the traditional rule and favors representatives of the press over ordinary citizens. When seats are reserved for reporters, as were 80 of the 150 courtroom seats in the *Westmoreland* trial, the representatives of the news media enjoy a right of first-hand observation at the expense of individual members of the public.

And the right of the public to observe trials of historic significance becomes a promise to the eye "to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

2. The Judgment Below Anachronizes The First Amendment by Holding That The Right to Observe Trials Arbitrarily Excludes Television Access To The Courtroom As A Protected Interest.

Despite an initial prejudice that television would convert judicial proceedings into vaudeville entertainment, the district court expressly found that social and technological developments have now rendered audio-visual access entirely consistent with judicial decorum, integrity, and fairness. Cable News' proposed television presence in the courtroom, the trial judge found, would be "no more intrusive than the familiar phenomena of courtroom artists working on their sketches and notetaking reporters making entrances and hasty exits to phone in their stories on deadline." (A23). Indeed, Judge Leval found that regulated audio-visual coverage of the trial might well *enhance* the quality of the judicial process. (A24). Yet the Court of Appeals majority held that "the public interest in television access to the courtroom does not *now* lie within the First Amendment" (A15) (emphasis added).

To say that the First Amendment somehow draws a bright line between the artist's pad and pastel crayons and a silent video camera is to ignore a central lesson of our constitutional history: our Constitution endures without frequent amendment precisely because it is flexible enough to reflect, and not to lag arbitrarily behind, social and technological change.[28]

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[28] *See Estes v. Texas*, 381 U.S. 532, 595 (1965) ("the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process") (Harlan, J., concurring).

Just as the Fourth Amendment has been held to encompass electronic eavesdropping even though the Framers had no idea that such devices could be responsible for "unreasonable searches," *see Katz v. United States*, *supra*, 389 U.S. at 352–53, so the First Amendment should be deemed flexible enough to broaden with the changing times. As Judge Robert Bork recently observed, we must

> discern how the Framers' values, defined in the context of the world they knew, apply to the world we know. . . . The First Amendment's guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the First Amendment relevant to radio and television broadcasting. . . . A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty . . . to ensure that the powers and the freedoms the Framers specified are made effective in today's circumstances.

Ollman v. Evans, 750 F.2d 970, 995–996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

Indeed, this Court has "long eschewed any 'narrow, literal conception' of the [First] Amendment's terms, *NAACP v. Button*, 371 U.S. 415, 430 (1963), for the Framers were concerned with broad principles. . . ." *Globe Newspaper Co.*, *supra*, 457 U.S. at 604; *Richmond Newspapers*, *supra*, 448 U.S. at 579–580 & n.16 (plurality opinion); *id.* at 587–88 & n.4 (Brennan, J., concurring in judgment).[29]

Despite these bedrock axioms of First Amendment jurisprudence, the Court of Appeals asserted that the supposedly "long

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[29] Whatever its other implications, the "constitutional saving clause" in the Ninth Amendment at least precludes the disparagement of unenumerated rights—such as the right to observe events electronically—that time reveals to be "indispensable to the enjoyment of rights explicitly defined." *Id.* at 579–80 & n.15 (plurality opinion).

leap" between a "public right under the First Amendment to *attend* trials" and a public right under that same amendment to *observe* trials via regulated television coverage "is not supported by history" (A14). Yet Anglo-American legal history in fact records a consistent commitment to keeping trials open and accessible for direct, first-hand observation by as many citizens as can decorously be accommodated. As early as 1565, one observer wrote that trials were held " '[i]n the towne house, or in some open or common place . . . All . . . is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so many as will, or can, come so neare as to heare it*, and all depositions and witnesses given aloude, *that all men may heare from the mouth of the depositors and witnesses what is saide.*' " *Press-Enterprise Co., supra*, 104 S. Ct. at 822–23 (emphasis in original) (quoting T. Smith, De Republica Anglorum 96, 101 (Alston ed. 1906)).

It is a fundamental feature of this tradition that practical difficulties of public access, like the exercise of First Amendment rights generally, warrant only those measures that are demonstrably the least restrictive ones available to meet the need.[30] Whenever direct observation by the public has threatened judicial decorum or integrity, the response has been *regulation* of the means of observation, not wholesale *prohibition*. Thus, "when in the mid-1600s the Virginia Assembly felt that the respect due the courts was 'by the clamorous unmannerlynes of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it selfe neglected,' the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them." *Richmond Newspapers*,

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[30] *See Globe Newspapers Co., supra*, 457 U.S. at 606–607 (denial of a right of access to criminal trials must be shown to be "necessitated by a compelling government interest, and . . . narrowly tailored to serve that interest"); *FCC v. League of Women Voters, supra*, 104 S. Ct. at 3118 (restraints on the electronic media must be "narrowly tailored to further a substantial government interest").

supra, 448 U.S. at 567 (quoting A. Scott, Criminal Law in Colonial Virginia 132 (1930)).[31]

A Constitution wedded to the technology and perceptions of the past would rapidly become a hollow anachronism. The judgment of the Court of Appeals that television must remain excluded from the courtroom until some unspecified future point at which "the First Amendment expands to include television access" (A16) reflects a strangely ossified and oddly discontinuous picture of the constitutional process—one that urgently merits this Court's corrective attention.

3. Only The Proposition That The First Amendment Is Not Implicated In Any Way By A Flat Ban On Audio-Visual Coverage of Trials Could Possibly Support The Judgment Below.

For two reasons, this case presents an ideal vehicle for consideration of the scope of the First Amendment right to observe trials whenever observation is sought by means other than simple physical attendance by a fortunate few. First, a principle that would both trivialize and anachronize the access right first recognized in *Richmond Newspapers* has been promulgated by the appellate court below in the broadest possible form. Second, the facts of the case to which the Court of Appeals applied its principle implicate none of the causes for concern about television in the courtroom that might otherwise supply a narrower basis for the judgment below.

The issues of military veracity and ethical journalism about which *Westmoreland v. CBS* revolved are of undisputed national importance. Although a telecast of the trial, either live *or* delayed, might not lure every viewer away from sit-com reruns and professional wrestling matches, the test of "the best and the brightest" in the crucible of trial examination in Judge Leval's courtroom constituted history in the making. Live

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[31] The categorical ban upheld below cannot be sustained as a mere time, place or manner restriction. *See* pp. 23–24, *infra*.

viewing by many would have been likely; delayed study by others would be assured.

This is a trial to which television was no stranger. For the facts and law of the *Westmoreland* lawsuit were heavily seasoned with television. Vietnam was our first "living-room war," and the military's alleged manipulation of intelligence data to influence public opinion was the central theme of the challenged CBS documentary. From the outset the courtroom was filled with video technology for viewing both the challenged television journalism and extensive depositions of the principal witnesses.[32]

Nor was television an unwanted intruder from the perspective of those most directly involved. The parties affirmatively consented to live television coverage; and there is no indication that any witness or any other trial participant had any objection. On the contrary, the parties and their witnesses all desired to reach the largest possible national audience in order to vindicate their respective versions of the truth.[33] They all had extensive experience in front of cameras. No special concern for privacy, such as might be at stake in a sex offense or juvenile case, was implicated. Yet these facts were irrelevant to the judgment below—a judgment which would have been unaffected by affidavits from every person who might set foot in the courtroom—for the Court of Appeals was unconcerned with whether any witness or other participant would or had cause to object to the presence of a camera. It cared only that General

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[32] Under Rule 30(b)(4) of the Federal Rules of Civil Procedure, the parties recorded many of their depositions by videotape, and much of the critical trial evidence was presented on video monitors. The federal courts' adoption of advanced audio-visual technology to improve the search for truth in the courtroom stands in sharp contrast to the Court of Appeals' categorical resistance to the unobtrusive use of that technology to improve the flow of information about federal cases to the public.

[33] In their joint statement upon stipulated dismissal of the case, the parties confirmed the role of the trial in "broaden[ing] the public record" and in placing "their respective positions . . . before the public for its consideration." (A54).

Rule 7, which makes no exceptions for cases where all participants and witnesses welcome the camera, would be violated by the use of that technology—even though the trial judge, in a carefully reasoned opinion, set forth undisputed findings that the proposed comprehensive coverage, under guidelines tested by over forty states, would be wholly unobtrusive and would have an entirely beneficial impact on the administration of justice in the case at hand.

Finally, the proposed coverage would have posed no threat to the trial judge's control over his courtroom. Cable News' actions in the courtroom would have remained subject to his plenary regulation. Indeed, it is the mandatory ban on audio-visual coverage that usurps the trial judge's traditional prerogatives and that ignores the conventional wisdom that such things are best left in the first instance to the sound discretion of the responsible court, exercised according to the circumstances of each case, and subject, of course, to appropriate appellate review.

The concurring opinion by Judge Winter leaves no doubt that *only* the majority's wholesale exclusion of television access from the domain of the First Amendment could produce this extraordinary result. Agreeing with Petitioner that the denial of its request to cover the trial squarely implicated the First Amendment because "access to the courts for the purpose of conveying information to the public about judicial proceedings falls within the area of protected speech" (A16–17), Judge Winter concluded that the ban on audio-visual coverage was a valid time, place or manner restriction, simply because of what he deemed the "reasonable belief that the potentially undesirable effects of television cannot be detected . . . in a timely fashion on a case-by-case basis" (A20). For Judge Winter, this supposed difficulty sufficed, without more, to warrant a *per se* rule of exclusion (A20).[34]

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[34] At no point did the concurring opinion attempt to explain why case-by-case predictions of the likely effects of television in the courtroom were more difficult than case-by-case predictions of the likely effects of the presence of public observers, including artists armed with conspicuous sketch pads.

Properly understood, however, the ban at issue here is *not* a mere "manner" restriction. The right Cable News seeks to vindicate is not merely the right to collect information for its own subsequent editing and use in the manner it might prefer. It is, rather, the right, "as surrogate for the public," to supply, to a nation of would-be court attendees, the "reality of the [then occurring] real life drama once available only in the courtroom" itself. *Richmond Newspapers*, *supra*, 448 U.S. at 572–73. Like other rights of virtual representation, this one is in every practical sense extinguished if it is diluted.

Nor is the exclusion of Petitioner's camera sustainable as a "place" or "time" restriction, by virtue of a court's power to control the physical space within the courtroom during the time of trial. The fact that the speech in question happens to be transmitted from a device located *within* rather than *without* the courtroom is constitutionally irrelevant—just as it was constitutionally irrelevant that the speech in question in *Katz v. United States*, *supra*, happened to be intercepted, as a physical matter, by a device located without rather than within the telephone booth involved in that case. For the First Amendment, like the Fourth, does not depend for its reach upon "the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353. The ban imposed by General Rule 7 is a permanent blackout of otherwise protected communications and not a mere preservation of courtroom decorum—particularly since the district court expressly found that the proposed coverage posed no threat to judicial decorum or integrity, and since any demonstrable threat from live coverage of a future trial could be met by authorizing coverage for historical use only.

In essence, the concurring opinion ruled that First Amendment interests may be categorically outweighed by a fear that a case-by-case approach would yield a presumption in favor of full access. (A18–19). But this argument proves too much, for it would justify *per se* rules mandating trial closures during the testimony of minors in sex offense trials, contrary to the holding of *Globe Newspaper Co.* Indeed, it would justify a *per se*

rule mandating the exclusion of all public observers for national security reasons throughout any trial that even indirectly involves the military—such as the *Westmoreland* trial itself. But the First Amendment can afford no more tolerance for *per se* judge-made rules that suppress protected communication than for such *per se* rules promulgated by other branches of government.

Moreover, the concurring opinion directly conflicts with this Court's prior holdings that restraints on speech, including restraints on the electronic media, must be "narrowly tailored to further a substantial government interest . . . in light of the particular circumstances of each case."[35] Indeed, the requirements of narrowness, precision and individual, case-by-case consideration of closure requests have already been imposed as a constitutional matter upon government actions that exclude members of the public from selected parts of trial proceedings: in *Globe Newspaper Co.* this Court unambiguously held that "a mandatory [exclusion] rule, requiring no particularized determination in individual cases, is unconstitutional," even where the rule leaves *most* parts of each affected trial open to public observers.[36]

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[35] *FCC v. League of Women Voters*, *supra*, 104 S. Ct. at 3118; *see also id.* at 3123, 3125–27 (need for narrowness, precision and exhaustion of less restrictive means); *Globe Newspaper Co.*, *supra*, 457 U.S. at 606–07 (exclusion must be "necessitated by a compelling government interest, and [be] narrowly tailored to serve that interest").

[36] 457 U.S. at 611, n.27; *see also Press-Enterprise Co.*, *supra*, 104 S. Ct. at 824, 826; *id.* at 826 (Blackmun, J., concurring); *id.* at 830 (Marshall, J., concurring in judgment); *Richmond Newspapers*, *supra*, 448 U.S. at 580–81. And, when the news media are unable to act as "a fiduciary for the public . . . a *partial* closure is no different than an absolute closure, requiring a most 'compelling interest' to justify it." *Douglas v. Wainwright*, 714 F.2d 1532, 1543 (11th Cir. 1983) (*dictum*, emphasis added), *vacated and remanded on other grounds in light of Waller v. Georgia*, 104 S. Ct. 3580 (1984).

If the analysis of the concurring opinion is taken as an alternate basis for the judgment below, then this case is worthy of review on certiorari by virtue of the conflict the decision would create both with this Court's holding in *Globe Newspaper Co.* and with First Amendment principles followed in the

Because speculation as to the supposed difficulty of deciding *which* trials to open to telecasting and which to close therefore cannot warrant a wholesale ban on a form of admittedly protected speech, *only* the majority's holding that the First Amendment has no bearing at all so long as a few members of the public are allowed to attend the trial can support the judgment below. And that holding, for the reasons developed above, merits plenary review by this Court.

B. THE JUDGMENT BELOW ENDORSES A STARK VIOLATION OF THE RULES ENABLING ACT BY PERMITTING RESPONDENTS TO ABRIDGE THE SUBSTANTIVE COMMON LAW RIGHT OF ACCESS WITHOUT CLEAR CONGRESSIONAL AUTHORIZATION.

Even if no First Amendment right were in issue here, the judgment below should still be reviewed and reversed because it allows a judge-made, *per se* administrative rule to override the evolving common law right of physical (including electronic) access to trial records, exhibits, and testimony expressly recognized by this Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). Part—although only

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decisions of other circuits. *See Douglas v. Wainwright*, *supra* (upholding exclusion of all but the press and the families of victim and defendant during victim's testimony in sex offense trial, but only upon particularlized findings); *In re Express News Corp.*, 695 F.2d 807, 810–11 (5th Cir. 1982) (holding violative of First Amendment a local district rule "categorical[ly] den[ying] all access" to jurors for post-verdict interviews without leave of court, "applying equally to jurors willing and anxious to speak and to jurors desiring privacy"); *cf. Gulf Oil Corp. v. Bernard*, 452 U.S. 89, 101–04 (1981) (district court orders that interfere with communications between parties and others must be set aside as abuses of discretion unless "based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties" and unless "carefully drawn [to limit] speech as little as possible . . . under the circumstances," with "[o]ther, less burdensome remedies" being exhausted before moving to "routine adoption of a communications ban").

part—of what audio-visual coverage of an entire trial provides is, of course, precisely such access to *all* of the evidence, even if not reduced to tangible form when first presented in open court. Without coverage by television, such access is arbitrarily limited to evidence already so reduced. The existence of the common law right to such access, and the unauthorized abrogation of it by General Rule 7 and Canon 3A(7), were specifically argued to the Court of Appeals,[37] but the court chose to ignore the issue, holding that, if the First Amendment were not violated by a categorical ban on television access to the courtroom, then there would be no substantive rights at issue at all (A8–9, 16 n.12). That position is untenable.[38]

The Court held in *Warner Communications* that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597; *see also id.* at 612–13 (Marshall, J., dissenting); *id.* at 615 (Stevens, J., dissenting). The right is not conditioned on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. *Id.* at 597. Writs compelling direct physical access to testimonial and other evidence produced in open court have been predicated on "the citizen's desire to keep a watchful eye on the workings of public agencies" and on "a newspaper publisher's intention to publish information concerning the operations of government." *Id.* at 597–98. The videotapes, introduced at trial, of various congressmen taking bribes in the Abscam cases were released by

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[37] *See* pp. 4–7 of Transcript of Oral Argument, Oct. 19, 1984 (A50–53).

[38] The Ninth Amendment, as a constitutional rule of construction, requires more latitude. Even the most conservative reading of the Ninth Amendment maintains that it preserves, subject to revision by Congress, unenumerated, non-constitutional rights such as those recognized at common law. *See, e.g.*, J. Ely, Democracy and Distrust at 35–38 (1980). At the very least, the amendment prevents the federal judicial and executive branches from disparaging common law rights, absent clear congressional authorization, simply because those rights are not ones the Court finds to be enumerated in the Bill of Rights or elsewhere in the Constitution itself.

court order for copying and public broadcast in recognition of the "high public interest in full opportunity to know whatever happens in a courtroom." *In re Application of National Broadcasting Co., Inc. (United States v. Meyers)*, 635 F.2d 945, 951 (2d Cir. 1980); *see also In re Application of National Broadcasting Co., Inc.*, 653 F.2d 609 (D.C. Cir. 1981); *In re Application of National Broadcasting Co., Inc. (United States v. Criden)*, 648 F.2d 814 (3d Cir. 1981). Under the evolving common law rule, the decision concerning access is left "to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Warner Communications*, *supra*, 435 U.S. at 599; *id.* at 613 (Marshall J., dissenting); *id.* at 613–14 (Stevens, J. dissenting).

To be sure, this Court denied release of the requested Watergate tapes in *Warner Communications*—but it did so on the express ground that the common law right of access to those tapes had been specifically overridden by Congress in the Presidential Recordings Act, 435 U.S. at 603–08. In the instant case, by contrast, the only relevant congressional legislation is a statute that expressly forbids the abridgment, by judicially promulgated rules of practice or procedure, of just such substantive rights. The judgment below allows the common law right of access to trial testimony to be truncated categorically by General Rule 7 and Canon of Judicial Conduct 3A(7): once uttered in a courtroom devoid of cameras and recorders, live testimony, unlike physical exhibits and tapes, becomes forever unavailable to all who would invoke that common law right. Yet the Rules Enabling Act, the very legislation that authorizes the federal courts to adopt such procedural and administrative rules, prohibits the application of such rules to "abridge, enlarge or modify any substantive right[s]." 28 U.S.C. Section 2072.[39] The common law right of physical access to trial evi-

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[39] The specific provisions under which Canon 3A(7) and General Rule 7 were adopted—28 U.S.C. Sections 331, 2071 and Rule 83, Federal Rule of

dence is certainly a "substantive" right, whether or not previously held to encompass live testimony. And it should go without saying that rules with so sweeping, nationwide, and permanent an impact upon communication are automatically invalid if not made pursuant to an authorization by Congress but simply promulgated pursuant to a court's "inherent" authority. *See New York Times Co. v. United States*, 403 U.S. 713, 718–19 (1971) (Black, J., concurring); *id.* at 732, 740 (White, J., concurring); *id.* at 741–42 (Marshall, J., concurring).

The Second Circuit's position seems to be that, if the First Amendment is not violated, then no substantive rights are at issue. (A8–9, 16 n.12.) But that position entirely ignores the substantive common law right of access recognized in *Warner Communications* and reduces the Rules Enabling Act to a redundancy. The Second Circuit simply closed its eyes to the abridgement of that common law right, and to the concomitant violation of the Rules Enabling Act, occasioned by the enforcement of General Rule 7. The court below should not be permitted so cavalierly to avoid its obligation to protect the common law rights of the public and the plain meaning of congressional limitations on the rulemaking power of federal courts.

VI.
CONCLUSION

Having said at the outset of the *Westmoreland* trial that the interests of the public and of posterity, as well as the course of justice, would be better served by television's presence than by its absence, Judge Leval concluded the proceedings by telling the jurors—who had been fortunate enough to witness that

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Civil Procedure—do not expressly include the limitation set forth in 28 U.S.C. Section 2072. However, Rule 83 was promulgated under Section 2072, and must, therefore, incorporate that limitation. Further, it is inconceivable that the power of the Judicial Conference to issue "suggestions" under Section 331 would authorize it to impair substantive common law rights when its grant of formal rulemaking authority does not. The same argument applies with equal force to Section 2071.

"extraordinary" trial, but who might feel "a sense of disappointment" that they would render no final verdict—that such a verdict would have been beyond their power in any event. For the law, he told the jury, has no "power to fix the judgment of history."

But the law *does* have power to decide whether that verdict is to be based on the fullest possible record. Is the irretrievable loss of direct public and historical observation of such landmark trials as this—a loss that was once technologically inevitable—to persist into the indefinite future under the rule upheld below? Because there could be no better occasion for this Court to address that question, a writ of certiorari should issue.

Respectfully submitted,

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March 1, 1985

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 471—August Term, 1984

(Argued: October 19, 1984 Decided: November 2, 1984)

Docket No. 84-7809

GENERAL WILLIAM C. WESTMORELAND,

Plaintiff,

v.

COLUMBIA BROADCASTING SYSTEM, INC; SAUTER, VAN G.; CRILE, GEORGE: WALLACE, MICHAEL: ADAMS, SAMUEL A.,

Defendants,

CABLE NEWS NETWORK, INC.,

Appellant.

IN RE WAIVER OF LOCAL RULE 7 TO PERMIT AUDIO-VISUAL COVERAGE OF THE TRIAL IN *General William C. Westmoreland* v. *CBS, Inc.*, 82 Civ. 7913 (PNL)

Before:

OAKES and WINTER, *Circuit Judges*, and CLAIRIE, *District Judge.**

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*Of the United States District Court for the District of Connecticut, sitting by designation.

Appealing from an opinion and order of the United States District Court for the Southern District of New York (Pierre

N. Leval, *Judge*), and from a determination of the Board of Judges of the United States District Court for the Southern District of New York (per Constance Baker Motley, *Chief Judge*), appellant, a television news broadcaster, seeks to provide television coverage of a trial, to be held in a federal courtroom, of a civil libel action in which both parties have consented to the coverage, notwithstanding the existence of a local General Rule of the district court prohibiting such coverage. Held: Because appellant lacks a First Amendment interest on which to ground its request to televise a federal trial, a court-rule prohibiting the presence of television cameras at judicial proceedings is neither unauthorized nor unconstitutional, as applied to the trial appellant seeks to televise.

Orders affirmed.

Laurence H. Tribe, Cambridge, MA (Robert G. Morvillo, Obermaier, Morvillo & Abramowitz, P.C., New York, NY, Stuart F. Pierson, Ann K. H. Simon, William E. Kennard, Andrew D. Koblenz, Mark E. Martin, Verner, Liipfert, Bernhard & McPherson, Chartered, Washington, DC, of counsel), *for Appellant*.

Steven E. Obus, Assistant United States Attorney (Rudolph W. Guiliani, United States Attorney for the Southern District of New York, Thomas D. Warren, Assistant United States Attorney, of counsel), *for the Board of Judges of the United States District Court for the Southern District of New York*.

The United States Attorney's Office apeared in its capacity as an officer of the Southern District Court to file a brief for the Board of Judges.

OAKES, *Circuit Judge:*

This case presents the novel question whether a cable news network has a right to televise a federal trial and the public a right to view that trial—where the court is adjudicating a civil action, where both parties have consented to the presence of television cameras in the courtroom under the close supervision of a willing court, but where a facially applicable court rule prohibits the presence of such cameras. The rule is backed by a canon of the Code of Judicial Conduct for United States Judges and supported by resolutions, recommendations, and reports of the Judicial Conference of the United States. It was adopted by federal district court in which the trial in question is taking place, pursuant to the statutory and rulemaking power the district court holds to determine the conduct of trial procedure within its courtrooms.

The challenge we address, however, is directed to the rule as applied to a particular trial, *Westmoreland* v. *CBS, Inc.*, 82 Civ. 7913 (S.D.N.Y. filed Nov. 30, 1982) (Leval, J.) The appellants argue that, given the extraordinary nature of the *Westmoreland* trial, the application of a general rule prohibiting television coverage of that trial is both beyond the court's powers and in violation of the First Amendment rights of the television network and the public. Moreover, the facts that frame the *Westmoreland* trial are asserted to be of particular importance, because the substantive issues in *Westmoreland* implicitly mirror the institutional tensions raised before this court—in *Westmoreland*, one party seeks redress of injury flowing from statements asserting that the Government withheld information from the public in order to insulate the Government from public scrutiny; while the other party, seeking to defend the integrity of those statements, implicitly defends the integrity of the medium through which those statements were made. Be this as it may, assuming arguendo that *Westmoreland* presents the paradigm case for televising a federal trial, we nevertheless affirm, for the reasons we state below.

Facts

The trial of *Westmoreland* v. *CBS, Inc.* commenced before the United States District Court for the Southern District of New York, Pierre N. Leval, Judge, on October 9, 1984, in a courtroom that, we assume on judicial notice, accommodates no more than 150 seats, 80 of which have been set aside for the news media. We assume that the appellant, Cable News Network, Inc.,[1] correctly describes the case in noting "the pervasive and historical import of its issues, the prevalence of television in its facts and law, and the unanimous desire of the participants to disseminate the entire trial to all who would observe." We also assume, as put forth by the district court, that among the questions at issue in the trial will be whether the high United States military command in Vietnam willfully distorted intelligence data to substantiate optimistic reports on the progress of the war and whether one of the nation's most important sources of news and commentary subsequently engaged in defamation of a public figure. These issues are no doubt of considerable, if not, as the district court believes, the "highest" national importance.

We further assume the truth of CNN's assertion that the guidelines it proposed to the district court on a one-case experimental basis follow the guidelines of some forty-one states that now permit, in one form or another, audiovisual coverage of court proceedings, trial, appellate, or both. We may therefore assume that those guidelines have been reasonably tested in the state courts and are narrowly tailored to achieve unobtrusive distribution of audiovisual coverage.[2] Thus, CNN's ini-

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[1] CNN is a 24-hour television news network subsidiary of the Turner Broadcasting Co. of Atlanta, Georgia. Its programs reach more than 27 million people, and its operations are supported by extensive experience in providing comprehensive live coverage of court trials.

[2] The guidelines proposed were to the effect that sole power to control coverage rests with the trial judge; that the experiment is based upon consent of the parties and agreement of the media; that television and radio

tial petition to the district court for permission to distribute comprehensive coverage of the *Westmoreland* trial reflects a conscientious broadcaster taking appropriate steps to join an important issue in the courts.

In a carefully reasoned opinion and order, Judge Leval felt that, for various reasons summarized in the margin,[3] CNN's petition "should be granted." Nevertheless, he denied the application on September 19, 1984, because "the rules of the Judicial Conference and of this court are to the contrary," and because he believed that the rule was not subject to waiver. On September 27, 1984, CNN filed a motion for reconsideration, based on the argument that the reasoning underlying the court's previous denial of CNN's petition constituted an authoritative finding that the general factual premises underlying

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coverage would be pooled; that there would be no audio pickup of communications between attorneys and clients, conferences at the bench, etc.; that there would be one television and two still cameras at approved locations, without distracting sound or light, all per an appended diagram, with personnel in place 15 minutes before proceedings commence. These guidelines appear to follow those reviewed in *Chandler* v. *Florida*, 449 U.S. 560, 566 (1981); *see also In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 778-79, 783-84 (Fla. 1979). As to any classified information involved in *Westmoreland*, CNN essentially waives access.

[3] These reasons include:

1. The experience of many states that live telecasting need not interfere with the fair and orderly administration of justice;

2. Other cases where exclusion of television might be necessary may be faced as they arise;

3. Telecasting does not offend the Constitution but perhaps infringes on the litigants' or public's rights to a public trial;

4. The public should see how the courts function, especially where the public interest is involved as it is here, where "[i]t could even be reasonably argued that the filming of this trial is more important than its decision";

5. It would be in the interest of the federal judiciary to let the public see how hard it works and how fair it is, were trials generally to be televised;

6. It is a safe prediction that the eventual entry of the camera into the federal courtroom is inevitable.

Canon 3A(7)[4] of the Canons of Judicial Conduct for United States Courts (hereinafter Canon 3A(7)) and Local General Rule 7[5] of the Southern District of New York do not apply to the circumstances of this case. The motion for reconsideration was denied by Judge Leval on September 28, 1984.

Meanwhile, on September 19, 1984, CNN had petitioned the Board of Judges of the Southern District for a waiver of General Rule 7. We will treat, as the parties have treated, a letter of October 1, 1984, signed by Chief Judge Constance Baker Motley, stating that "it was the view of the Board of Judges that Local Rule 7 should not be waived," as a denial of that petition.

This appeal is by CNN from the opinion and order of Judge Leval dated September 19, 1984, denying the initial petition to distribute coverage, from the denial of CNN's motion for reconsideration dated September 28, 1984, and from the determination of the Board of Judges denying CNN's petition for waiver

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[4] Canon 3A(7) provides:

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

a. The use of electronic or photographic means for the presentation of evidence, or for the perpetuation of a record; and

b. The broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

[5] General Rule 7 of the United States District Courts for the Southern and Eastern District of New York provides:

The taking of photographs and the use of recording devices in the courtroom or its environs, except by officials of the court in the conduct of the court's business, or radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings, including proceedings before a United States Magistrate, whether or not the court is actually in session, is prohibited.

This was apparently adopted pursuant to Recommendation D of the Judicial Conference of the United States, 87 F.R.D. 518 (1980) (tracking a 1962 resolution to the same general effect).

of General Rule 7 on October 1, 1984. CNN initially filed a petition for a writ of mandamus with this court; but on the basis that such a writ may not be used in lieu of an appeal, the petition was denied by a panel consisting of Judges Kaufman, Pierce, and Winter.

Discussion

Appealability

The circuits have expressed some disagreement concerning the proper avenue for appellate review of district court orders limiting media access to judicial proceedings. *See United States* v. *Chagra*, 701 F.2d 354, 359-60 (5th Cir. 1983). Recently, this court followed the Third Circuit's approach of allowing media intervenors to appeal orders limiting courtroom access under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because such an order is a final disposition by the district court collateral to the rights asserted in the main action and posing a risk of irreparable harm while involving a serious and unsettled question of law. *See In re Herald Co.*, 734 F.2d 93, 96 (2d Cir. 1984). Like the *Herald* panel, we find that the district court "in effect permitted [the press] to intervene in the pending . . . case, at least for the purpose of objecting to closure of the courtroom." *Id.*; *see Chagra*, 701 F.2d at 358-59 (relying on the collateral order doctrine regardless of whether the media appellant intervened); *Newman* v. *Graddick*, 696 F.2d 796, 800 (11th Cir. 1983) (same); *cf. Martin-Trigona* v. *Schiff*, 702 F.2d 380, 385-86 (2d Cir. 1983) (holding that "there are situations where a nonparty is allowed to appeal if the trial court's judgment has affected the nonparty's interest"). *See also United States* v. *Mitchell*, 386 F. Supp. 639, 640 (D.D.C. 1975) (motion filed by press objecting to closure order treated as separate miscellaneous civil proceeding). We thus treat the orders of the district

court and the determination of the Board of Judges[5a] as appealable.

CNN's Ultra Vires Argument

CNN argues that General Rule 7 is unauthorized as applied to this case, because 28 U.S.C. § 2072, the ultimate statutory authority for the provision,[6] prohibits the adoption of rules that

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[5a] Judge Winter may well be correct that an appeal from a ruling of the Board of Judges is not ordinarily and should not be appealable since, presumably, the Board will ordinarily be acting, if it acts at all, in an administrative rather than a judicial capacity. We express no opinion on the wisdom or propriety of a Board of Judges' acting upon individual applications for the waiver of a local rule of general application although we can envisage the administrative and appellate difficulties that freely entertaining such petitions might conceivably bring about. Where, however, as here, the district court has invited a petition for waiver by holding in effect that it would have granted the petition to televise had it the power to do so, where the matter has been briefed and argued for the Board of Judges (and incidentally not for the district judge), and where the substantive points of the validity of the rule and of the denial of waiver arise in the context of the First Amendment and potential prior restraint, we will, without in any way announcing a rule of general applicability, treat the denial of waiver as appealable in conjunction with the attack on Judge Leval's order, for the purposes of this case only.

[6] There are actually several provisions that authorize the adoption of General Rule 7. Under 28 U.S.C. § 2071 "the Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business . . . consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." Fed. R. Civ. P. 83 provides that "[e]ach district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules." The Notes of the Advisory Committee on Rules provide that "this rule substantially continues U.S.C. Title 28, Section 2071, formerly 731." Rule 79 of the New Equity Rules of 1912 stated:

> With the concurrence of a majority of the circuit judges for the circuit, the District Courts may make any other and further rules and regulations for the practice, proceedings and process, *mesne* and final, in their respective district, not inconsistent with the rules hereby prescribed, and from

"abridge, enlarge or modify substantive rights,"[7] and the application of General Rule 7 violates that prohibition in this particular case by abridging the First Amendment rights of CNN and the public.

The salient feature of this ultra vires argument is its dependence upon the existence of a substantive right under the First Amendment to television camera access to a federal trial.[8]

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time to time alter and amend the same.

The New Federal Equity Rules 299 (J. Hopkins ed. 1929).

Moreover, federal courts have "inherent powers," those which "are necessary to the exercise of all others." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); *see also Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980) (inherent powers must be exercised with restraint and discretion). Even in the absence of rulemaking authority, regulation of the courtroom lies within the inherent power of the courts.

[7] 28 U.S.C. § 2072 provides in part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

[8] CNN also argues that the Code of Judicial Conduct for United States Judges cannot be binding because it was adopted without citation to any statutory or other authority. *See* 69 F.R.D. 273 (1976); Annual Report of the Director of the Administrative Office of the United States Courts 9-11 (1972). Specifically, the Judicial Conference that adopted Canon 3A(7), which General Rule 7 implements, derives its authority from 28 U.S.C. § 331, which speaks of "suggestions to the various courts in the interest of uniformity and expedition of business," and does not purport to enable the courts to adopt procedural rules that affect substantive rights. The foregoing analysis of the statutory authority of Canon 3A(7) serves to supplement CNN's attack on the statutory authority for General Rule 7, but we need not address it here. It is General Rule 7, not Canon 3A(7), that is at issue here.

CNN does not argue against the authority of the judiciary to adopt general rules prescribing the conduct of courtroom proceedings. It instead argues that in this particular case, the First Amendment abridgement resulting from the implementation of General Rule 7 renders its application here ultra vires. The constitutional issues emerge as determinative of CNN's claims in this case, and to those issues we now proceed.

The Constitutional Right to Obtain Waiver of General Rule 7 in the Westmoreland *Trial*

As an initial matter, we address the First Amendment claims of the press but quickly fold them, given the circumstances of this case, into the First Amendment claims of the public, for CNN's status as a member of the press does not entitle it to claim a First Amendment right to televise federal trials. As Chief Justice Warren observed in *Estes* v. *Texas*, 381 U.S. 532, 585-86 (1965) (concurring opinion), "On entering [the courtroom], where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present to observe the proceedings, and thereafter, if they choose, to report them." Similarly, in Justice Harlan's critically important[9] concurring opinion in *Estes*, he said that "there is no constitutional requirement that television be allowed in the courtroom." *Id.* at 587; *accord Chandler* v. *Florida*, 449 U.S. 560, 569 (1981); *cf. Belo Broadcasting Corp.* v. *Clark*, 654 F.2d 423, 428 (5th Cir. Unit A 1981) (holding that the press enjoys no constitutional right to physical access to courtroom exhibits). Although *Chandler* v. *Florida* held that *Estes* does not stand as a ban on state experimentation with evolving television technology, it nevertheless did not endow the media with substantive rights qua media. *Cf. Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 610 (1978) ("the guarantee of a public trial . . . confers no special benefit on the press").

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[9] *See Chandler* v. *Florida*, 449 U.S. at 571-73 & n.8.

Two premises underlie CNN's constitutional claim that the public possesses a First Amendment right to television camera access to this particular trial. The first is that, in the adjudication of the claims in *Westmoreland*, the trial serves as a public forum. The second is that the opportunity for all members of the public to see and hear the trial as it occurs is protected by the First Amendment.

The public forum premise in CNN's constitutional argument is itself predicated upon the view that trials have always been "public" in the broad sense that the courtroom is such a paradigmatic platform for public communications "that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 429 n.10 (1979) (Blackmun, J., concurring in part and dissenting in part) (quoting *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.)). The litigation involved here is said to serve as a constitutionally protected "form of political expression." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963). It is suggested that the federal courtroom in this case is even more clearly a public forum for the parties to the litigation than was the criminal trial at issue in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), where the Supreme Court upheld a First Amendment right of the public and press to observe a criminal trial over the protest of the accused. *See also Publicker Industries, Inc.* v. *Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (holding that the public has a right of access to civil proceedings). However this may be, it has never been suggested that there is a link between the First Amendment interest that a litigant has in his trial as a "form of expression" and the right that the public may have to view that expression on television. Whatever public forum interest may exist in litigation, that interest is clearly a speaker's interest, not an interest in access to the courtroom. Because the ability of neither General Westmoreland nor CBS to express views at trial is altered by the presence or absence of television cameras, CNN's public forum argument is, by itself, inapposite. CNN's constitutional argument rests on its second premise.

The second premise in CNN's constitutional argument is the proposition that the public's opportunity to see and hear a trial is protected by the First Amendment. We, of course, agree that the public (in this instance, the putative viewers) has First Amendment interests that are independent of the First Amendment interests of speakers (in this instance, the parties to the trial). *See, e.g., First National Bank* v. *Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual."); *Bates* v. *State Bar*, 433 U.S. 350, 364 (1977) ("The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976). (Powell, J. concurring) ("Vital to this concern [of the free speech guarantee] is the corollary that there be full opportunity for everyone to receive the message."); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (First Amendment "protection . . . is to the communication, to its source and to its recipients both"). It may also be true that the public's right to receive information may not be vitiated by appeals to the availability of alternative means for receipt of the information. *See Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972). No case, however, has held that the public has a right to televised trials.

The cases referred to us by CNN involve orders closing the courtroom to members of the press and public. None involve orders permitting such access while not permitting television cameras in the courtroom. There is, to be sure, an abundance of support in the cases for a constitutionally grounded public right of access to the courtroom. In *Richmond Newspapers*, 448 U.S. at 580 n.17, Chief Justice Burger, speaking for himself and for Justices White and Stevens, stated that "[w]hether the public has a right to attend trials in civil cases is a question not raised by this case, but we note that historically both civil and

criminal trials have been presumptively open." Justice Brennan, in his concurring opinion, *id.* at 596-97, stated that publicizing trial proceedings aids accurate factfinding and furthers the public purposes of trials. Justice Stewart, concurring, stated that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599; *see also id.* at 604 (Blackmun, J., concurring). As pointed out in *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603 (1982), the decision in *Richmond Newspapers* "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials . . . seven Justices recogniz[ing] that this right of access is embodied in the First Amendment." Underlying that First Amendment right of access "is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs,' *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966)." *Id.* at 604; *see also Press-Enterprise Co.* v. *Superior Court*, 52 U.S.L.W. 4113 (U.S. Jan. 18, 1984) (guarantee of open public proceedings in criminal trials covers proceedings for the voir dire examination of potential jurors).

Furthermore, we agree with the Third Circuit in *Publicker Industries, supra*, that the First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in *Richmond Newspapers*, because public access to civil trials "enhances the quality and safeguards the integrity of the factfinding process," *Globe Newspaper*, 457 U.S. at 606, "fosters an appearance of fairness," *id.*, and heightens "public respect for the judicial process," *id.*, while permitting "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government," *id.* We may submit to all of this, and yet not submit to CNN's argument, because these cases articulate a right to *attend* trials, not a right to view them on a television screen. *See Richmond Newspapers*, 448 U.S. at 577 n.12 (Burger, C.J., joined by White, J., and Stevens, J.).

CNN argues that because a courtroom is so small that not every person who wishes to attend can be accommodated or can even arrange to be physically present, the public's rights are wholly diluted. The public may read about the trial from the printed transcript or a newspaper account only after some delay, or it may receive radio or television reports similarly filtered through a reporter, with no opportunity to hear and observe directly the trial in process. The public, CNN argues, is relegated by the operation of the rule to "qualitatively inferior, stale and wooden interpretations of what occurred."

There is a long leap, however, between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history. It is a leap that we are not yet prepared to take. It is a leap that many federal judges and, indeed, apparently the judges of the Southern District of New York, one of the most eminent district courts in the United States, oppose. CNN's argument, of course, is not that such a right is absolute, but rather that it is qualified, arising in a case presumably of public importance, with willing parties, a willing trial court, and guidelines so that the evils of television coverage contemplated by General Rule 7 or by the recent statement of the Ad Hoc Committee of the Judicial Conference of the United States on the subject[10] do not in fact occur.

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[10] While this case was pending, the Ad Hoc Committee on Cameras in the Courtroom reported to the Judicial Conference of the United States in respect to a March 8, 1983, petition of 28 radio, television, newspaper, and related organizations to permit broadcasting, televising, motion picture and still camera coverage of federal court proceedings. The committee concluded "that the alleged public benefits of the requested changes in the rules governing media coverage of currently open-to-the-public courtroom proceedings are outweighed by the risks to the administration of justice." Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom 3 (Sept. 6, 1984). These perceived risks included distractions and diversion of judicial time; psychological effects on jurors, witnesses, judges, and lawyers; jeopardizing "the required sense of solemnity, dignity and the search for

There may indeed come a time when the "experimentation," *Chandler* v. *Florida*, 449 U.S. at 574, with television coverage establishes that the concerns with expenditure of judicial time on administration and oversight of broadcasting; the necessity of sequestering juries so that they will not look at the television program of the trial itself; the difficulty in empaneling an impartial jury in the case of a retrial; the necessity of larger jury panels or increased use of marshals; the psychological effects on witnesses, jurors, lawyers, and judges; and related considerations of "solemnity," "dignity," and the like are considered secondary or basically irrelevant as impediments to the search for truth when a given case is televised. At such a time the presumption may well be that all trials should be televised, or televisable, at least where the parties agree. Before that time arrives, it is possible that on an experimental or individual basis the federal courts or a particular federal district court—we speak here of a court, as opposed to an individual judge thereof—may seek, subject to any higher authority, of course, to permit televising in individual cases.[11] But until that time, we certainly cannot say that a given district court lacks the power to prohibit all televising of trials within the district, across the board, because the public interest in television access to the courtroom does not now lie within the First Amend-

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truth." *Id.* at 7. The asserted public benefits of understanding and education were felt to be illusory since coverage is necessarily selective and "sensational." The 14-member committee was unanimous.

[11] Indeed, in a case sub judice in this court, District Judge Leonard B. Sand has observed that "[t]he continuing wisdom and appropriateness of [General Rule 7], as well as all other local rules, is the subject of continuing scrutiny and analysis by the judges of [the district] court and especially the Rules Committee." *United States* v. *Yonkers Bd. of Educ.*, 587 F. Supp. 51, 53 (S.D.N.Y. 1984) (no tape recorder allowed in courtroom, appeal argued August 6, 1984, before a panel of Circuit Judges Van Graafeiland and Winter and District Judge Bartels).

ment.[12] Instead, our point is that until the First Amendment expands to include television access to the courtroom as a protected interest, television coverage of federal trials is a right created by consent of the judiciary, which has always had control over the courtrooms,[13] a consent which the federal courts, including the Southern District of New York, have not given.

Judgment in accordance with opinion.

WINTER, *Circuit Judge*, concurring in the result:

I respectfully disagree with the rationale of Judge Oakes' opinion,[14] although I concur in the result. In my view, access to

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[12] Consequently, CNN's ultra vires argument fails, because it is predicated upon the existence of a substantive right abridged by the application of General Rule 7—a substantive right that we do not find.

[13] It has never been suggested that the courtroom, even to the extent that it is perceived to be a public forum, is not subject to the control and direction of the court. CNN concedes as much, agreeing that the judiciary has the power "to adopt general rules of conduct concerning media coverage of trials or to require their observance in ordinary circumstances." As the Court recognized in *Sheppard* v. *Maxwell*, 384 U.S. 333, 358 (1966), "the courtroom and courthouse premises are subject to the control of the court." Moreover, courts, like schools and libraries, are at most only secondarily institutions to foster public debate. Rather courts exist primarily to adjudicate legal controversies. Thus, they are public forums only in a special sense, "with government enjoying," as one commentator has put it, "the power to preserve such tranquility as the facilities' central purpose requires." L. Tribe, *American Constitutional Law* § 12-21, at 690 (1978) (citing *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 513 (1969) (dictum), and *Grayned* v. *City of Rockford*, 408 U.S. 104, 107-17 (1972); *see also* M. Nimmer, *Freedom of Speech* § 4.09[B], at 4-54 n.76 (1984) ("Arguably a prohibition on television cameras in a courtroom constitutes a non-speech restriction since the evil to be avoided is not the communication of witness testimony, but rather the intimidation of witnesses by reason of the camera's presence."). Let us not forget that the event CNN seeks to televise is a *trial*.

[14] In addition to the disagreement recounted in the text, I would dismiss so

the courts for the purpose of conveying information to the public about judicial proceedings falls within the area of protected speech under the First Amendment. Since live television is one of the many ways in which such information may be conveyed, the First Amendment is implicated in a request to televise. However, I believe that Rule 7 is a legitimate time, place or manner restriction on otherwise protected speech. *See Cox* v. *Louisiana*, 379 U.S. 536 (1965).

The issue most easily resolved for me is whether the First Amendment is implicated by denial of a request to televise judicial proceedings live. Public access to ongoing judicial proceedings for purposes of reporting on them is protected by the First Amendment, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), and must be allowed even in pretrial hearings in criminal matters absent a demonstrable need for secrecy. *In re Application of The Herald Company, United States of America* v. *Michael Klepfer*, 734 F.2d 93, 100 (2d Cir. 1984). I believe it follows from those cases that, where the media must be permitted access, particular forms of access may be barred only on a time, place and manner theory.

My reasons for upholding Rule 7 on such a theory are more complex. The fact that the Judicial Conference of the United States has recommended adoption of such a rule, that an *ad hoc* committee of that Conference recently reexamined the issue

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much of the present matter as purports to be an appeal from what is treated as a ruling of the Board of Judges of the Southern District. Whether individual litigants should be accorded special rulings by that Board with regard to waiver of Local Rules is not for me to comment upon other than to say that such a ruling is not an appealable judgment. Attacks on the validity of local rules can and should be heard by a district court which will in due course issue a judgment. To the extent that a Board of Judges issues decisions other than the promulgation of local rules, those decisions also must be challenged in a district court. The suggestion that decisions by the Board may be appealed under 28 U.S.C. § 1291 is one that we, and any Board of Judges adventurous enough to respond to requests from individual litigants, will come to regret.

and unanimously declined to recommend a change, and that Canon 3A(7) states that federal judges should prohibit television in their courtrooms, obviates for me any need to inquire *de novo* into whether the apprehensions about television are reasonable. The cumulative years of experience and considered deliberation represented by these various statements are more than ample to justify some restrictions on live television, whatever the views of an individual judge faced with a request to televise.

However, when closely analyzed, the various reasons for concern over television do not exclude the possibility that television may not be harmful in each and every case. CNN thus argues with some considerable force that, even assuming the apprehensions about television are correct, a *per se*, no exceptions rule banning television cannot be justified as a time, place and manner restriction.

Because I differ with the majority on the First Amendment issue, I must address CNN's argument that only a case-by-case determination with regard to television can be constitutionally justified. This contention seems to me to be in error because the various apprehensions about television—expenditure of judicial time on oversight, the need to sequester juries, difficulties in selecting juries, effects on witnesses, jurors, lawyers, judges, and court administration, etc.—when balanced against the arguments for television—public interest, importance of the subject matter, etc.—simply do not provide workable standards to govern a trial court's exercise of discretion. Indeed, because it is unworkable, a case-by-case rule will likely evolve into a presumption in favor of television. If the apprehensions about television are to be given weight, therefore, a *per se* rule can be justified.

Consider the decisional process of a case-by-case approach. A request to televise is first made by a network or local station. The very existence of that request indicates the existence of a strong public interest. Absent such an interest, no request will

be made, and the issue will not arise. In almost every case in which the issue arises, therefore, an ostensibly strong claim as to the benefits of television, i.e. public interest, can be made, as it was here.[15] Next, the district judge weighs the (assumed to be valid) apprehensions about television against the claims of benefit. However, the decision to allow or disallow television must be made *ex ante*, well before the costs in judicial time and court administration, effects on witnesses, jurors, or lawyers can be known. Indeed, if such matters can ever be determined with certainty in a particular case, it is only after the fact. Once made, moreover, the decision to televise is likely to be final since the exclusion of television in the middle of a trial or for some witnesses may distort television coverage or affect the jury's verdict.

Seeking the views of the parties is possible but exposure of the reasons *pro* and *con* through true adversary argument is unlikely. Even a request for this might put unfair pressure on them lest opposition to television be revealed to the jury, which might then draw an improper inference. A party must also fear television commentary on its opposition to television coverage of a trial. It may be that in the instant case both General Westmoreland and CBS actually desired television. It is certain that neither would dare object. Finally, the fear of seeming to oppose television will likely induce parties to avoid making any of the arguments against it in a particular case.

The decision-making process of a case-by-case approach, therefore, is one in which the claim for television will almost

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[15] The district court made much of the fact that sensationalism is not an element here, as it might be in other cases such as a murder trial. Op. at 6. Curiously, in doing so Judge Leval made arguments that seem to undercut the supposed need for live television. He disposed of any sense of immediacy by declaring that the extended analysis by historians and commentators might be a more important reason for filming the trial than the verdict itself. Filming solely for historical purposes with no prospect for broadcast as news implicates different issues, however, and is not before us.

always seem strong and the arguments against it will usually be unstated and always speculative. In practice, a case-by-case approach leaves a trial court to choose between allowing television or assuming a position as its sole adversary, and a largely uninformed one at that. The *de facto* result of the case-by-case approach may thus be very similar to a *de jure* rule allowing television in every case where demonstrable reasons for individual privacy do not exist. Even though it purports to respond to the apprehensions about television reflected in the various actions of the Judicial Conference and in the Canons, the case-by-case approach might in practice give them no weight whatsoever.

It is not, of course, a certainty that a case-by-case rule is unworkable or that it will quickly evolve into a strong presumption in favor of television. However, a reasonable belief that the potentially undesirable effects of television cannot be detected, or detected in a timely fashion, on a case-by-case basis is enough to justify a *per se* rule as a legitimate time, place and manner regulation. Telecasting of ongoing proceedings is only one of many methods of reporting to the public on judicial actions, and arguably no better a method than others so far as conveying that information is concerned.[16] If telecasting is thought to impinge on the adjudicatory process in an undesirable fashion and a *per se* rule is necessary to guard against such undesirable effects, Rule 7 passes constitutional muster.

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[16] The arguments marshalled by CNN as to television's superiority as a medium for reporting judicial proceedings are based on live, daily, gavel-to-gavel coverage of an entire trial. The relief CNN seeks, however, is the right to televise, including video recording, when it chooses to do so and to broadcast as much or as little as it chooses. *See* Appendix at 28.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GENERAL WILLIAM C. WESTMORELAND,
Plaintiff,

—against—

CBS INC., *et al.*,
Defendants.

OPINION AND ORDER
dated Sept. 19, 1984

Stuart F. Pierson
William E. Kennard
Andrew D. Koblenz
Verner, Liipfert, Bernhard,
and McPherson, Chartered
1660 L Street, N.W., Suite 1000
Washington, D.C. 20036

Robert G. Morvillo
Obermaier, Morvillo & Abramowitz, P.C.
1120 Avenue of the Americas
New York, New York 10036

Counsel for Petitioner
Cable News Network, Inc.
A Subsidiary of Turner
Broadcasting, Inc.

PIERRE N. LEVAL, U.S.D.J.

Cable News Network (CNN) petitions for permission to record and distribute live comprehensive televised coverage of

this trial. The petition recognizes that the introduction of cameras and recording equipment into a federal court proceeding is contrary to Canon 3A(7) of the Code of Judicial Conduct for the United States Courts and local General Rule 7 of this Court. The petition requests an experimental exception for this case for the purposes (1) of demonstrating to the federal courts that such use of cameras will not impair or diminish the integrity and effectiveness of a judicial proceeding and (2) of distributing (on a pooled basis) comprehensive coverage of a trial that raises profoundly important questions concerning this country's conduct of the war in Vietnam and the privileges, ethical responsibilities and liabilities of the press. All parties to the case support the application.

My training in the long accepted tradition that banished the camera from the federal courtroom produced an instinctive negative reaction. I have been taught to assume that cameras would turn trials into vaudeville. A more careful reading of the petition, however, reveals a powerful argument.

There was a time when the blanket exclusion of the camera from the courtroom was understandable and appropriate. Equipment was cumbersome and noisy. Film could not function indoors without either the popping of flash bulbs or glaring stage lights. Television was a novelty, geared toward low-brow entertainment. It was easy, and no doubt justified, to conclude that the intrusion of the camera would disrupt and pervert the orderly conduct of the serious business of courts. Today, much has changed. Cameras are small, noiseless and equipped with distance lenses. Modern technology has made film that is sensitive to ordinary indoor light, and sound recording is similarly advanced. It appears that filming can be done without the slightest obstruction of dignified, orderly court procedure.

Although in 1965 the Supreme Court concluded that television coverage of a criminal proceeding was incompatible with due process, *Estes v. Texas*, 381 U.S. 532, Justice Harlan opined that "the day may come when television will have be-

come so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process." 381 U.S. at 595.

History has shown that Justice Harlan wrote these words with characteristic foresight. More and more states gradually adopted rules permitting telecasting of court proceedings. In 1981 the Supreme Court ruled in *Chandler v. Florida*, 449 U.S. 560, that absent a showing of prejudice, the telecasting of a criminal proceeding did not infringe constitutional rights.

Since *Chandler*, the trend toward opening courtrooms to cameras and telecasting has accelerated. It appears from CNN's petition that 41 of the 50 states now permit live filmed coverage of court proceedings, generally under rules designed to insure that fair and orderly administration of justice is not impaired. The Code of Judicial Conduct governing the federal courts, however, has made no concession.

On consideration of this petition, I have come to question the wisdom of the categorical ban imposed by our code.

1. The experience of a multitude of states has shown that under appropriate rules preserving the court's control over the use of cameras, live filming and telecasting need not interfere in any degree with fair and orderly administration of justice. A single, silent, fixed-location camera is no more intrusive than the familiar phenomena of courtroom artists working on their sketches and notetaking reporters making entrances and hasty exits to phone in their stories on deadline.

2. I need not consider here whether there may be instances in which live telecasting might create pressures capable of prejudicing the outcome of a trial. Assuming for argument that this is a reasonable, if rare, possibility, it is sufficient answer for cases presenting such dangers to be dealt with as they arise. As the Supreme Court noted in *Chandler*, *supra* at

574–75, the possible importance of excluding cameras from some cases is not a reason to exclude them from all cases.

Here all parties wish the proceedings to be telecast. It is certainly not to protect them that cameras are excluded.

3. *Chandler* and the experience of 41 states has laid to rest the question whether, in the absence of prejudice, telecasting offends the Constitution. I would venture that the question courts will find more troublesome in the future is whether the mandatory exclusion of the camera violates the litigant's (and perhaps the public's) right to a public trial. But see *United States v. Hastings*, 695 F.2d 1278 (11th Cir. 1983). The Supreme Court has recently reaffirmed the importance of the constitutional principles requiring court proceedings to be held in public view, absent the most compelling reasons to the contrary. See *Waller v. Georgia*, 52 U.S.L.W. 4618 (May 21, 1984) (Sixth Amendment right to public trial encompasses suppression hearing); *Press-Enterprise Co. v. Superior Court*, 52 U.S.L.W. 4113 (Jan. 18, 1984) (voir dire examination of potential jurors covered by guarantees of public trial); *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613 (1982) (state statute cannot exclude press and public from testimony of minor victim of sex crimes without case-by-case determination that compelling interests of the state require exclusion). The question then arises whether good reasons must also be found for restricting the means of public access and the types of media coverage—especially where the restriction effectively precludes the public at large from gaining any meaningful acquaintance with the conduct of court business.

I would think it a strong argument on the part of a litigant—especially in the type of case that arouses strong public interest—that he depends on the monitoring presence of the camera to insure that witnesses tell the truth and that the court does not influence the jury by gesture, expression and tone. See *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979) (openness in court proceedings may improve quality of testi-

mony and cause all participants to perform duties more conscientiously).

4. The public's legitimate interest in obtaining the information it would receive is beyond dispute. Courts play a vital role in American life, in adjudicating civil disputes sometimes affecting the rights of huge classes, trying criminal indictments and interpreting the laws of the land. The people should have the opportunity to see how the courts function.

That opportunity effectively does not exist today. Of course, the doors of the courthouse are open, but people are busy, and judicial proceedings are time consuming. Generally a trial which takes 2 full weeks to conduct could be fairly condensed into one or two hours of informative film.

Apart from the public interest in familiarity with the general conduct of courts, the subject matter of this trial is of the most serious public importance. Among the questions in dispute will be whether the high U.S. military command in Vietnam engaged in willful distortion of intelligence data to substantiate optimistic reports on the progress of the war and whether one of the nation's most important distributors of news and commentary engaged in willful or reckless slander. It can be expected that the trial will go beyond the particulars of those two inquiries into issues of appropriate standards for both military commanders and press commentators.

The public interest is thus not the mere voyeurism that emerges for a sensational murder trial. It is a response to a rare debate and inquiry on issues of highest national importance.

It could even be reasonably argued that the filming of this trial is more important than its decision: historians and commentators on the war and on the press will not accept the verdict of the jury and the rulings of the judge as definitive answers. They will seek lessons and conclusions by analysis of the witnesses' testimony. The verdict may settle liability as between the parties; but it is unlikely to settle anything for

anyone else. Most certainly it will not settle the historical and ethical debates exposed by this action.

5. Finally, I believe it is very much in the interest of the federal judiciary to admit the camera into its proceedings. We are told that the public today holds judges in rather low esteem. We are assumed to be lazy, biased and venal. Recognizing that I do not qualify as a neutral observer, I am persuaded that this view of the federal judiciary is seriously mistaken. Perhaps this results from lack of public familiarity with court proceedings.

Since long before I joined their ranks, I have held federal judges in high esteem; all that I have seen of my colleagues since I joined them has confirmed my admiration. What I have seen is federal judges working long, hard hours with diligence and an unfailing conviction to fairness, determined to run their courts in pursuit of justice. Their remuneration is small compared to what they could easily earn in private life. With the rarest of exceptions (that have been prominently reported in the recent press), their integrity is beyond question. In the more than 20 years that I have worked as a lawyer and later a judge in the New York federal courts, I have never heard so much as a rumor affecting the integrity of a single judge of that bench.

I believe in sum that the federal judges are on the whole an admirable bunch who little deserve the low esteem in which they are held by public reputation. I suggest that the gap between the reality and the perception results largely from the fact that the public has little opportunity to see how scrupulously, how painstakingly and how fairly federal judges conduct court business. Repeatedly, we receive letters from jurors expressing their admiration for what they have observed in the course of their jury service. But the general public, which does not see the federal courts in action, harbors a different image.

Would it not be better for us to adopt rules that will occasionally permit the public to see us at our work and to judge for themselves.

6. I think it a safe prediction that the eventual entry of the camera into the federal courtroom is inevitable, whether this year, in five years or in ten. In the meantime, do we wish to adopt a stance of two feet firmly rooted in the past? Do we wish to hold back the clock by order and fiat?

* * *

In my view the petition should be granted for reasons explained above, but the rules of the Judicial Conference and of this court are to the contrary.

Believing that I have no discretion in the matter in the face of those rules, I deny the application, in spite of its merit.

Dated: New York, New York
September 19, 1984
SO ORDERED:

S/
Pierre N. Leval, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT

October 1, 1984

Mr. Robert G. Morvillo
Obermaier, Morvillo & Abramowitz, P.C.
1120 Avenue of the Americas
New York, New York 10036

Dear Mr. Morvillo:

I have received your letter dated September 19, 1984 relating to media coverage of *Westmoreland v. CBS*.

The Board of Judges of the United States District Court for the Southern District of New York has considered the petition of CNN which sought a waiver of Local Rule 7 to permit experimental audio-visual coverage of the trial in the *Westmoreland* case.

It was the view of the Board of Judges that Local Rule 7 should not be waived.

Yours truly,

Constance Baker Motley

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GENERAL WILLIAM C. WESTMORELAND,
Plaintiff,

v.

CBS INC., *et al.*,
Defendants.

Civil Action
No. 82 Civ. 7913 (PNL)

RE: PETITION OF CABLE NEWS NETWORK

ORDER:
CNN'S MOTION FOR RECONSIDERATION IS DENIED.

So ordered.

(S/Pierre N. Leval, USDJ)

9/28/84

APPENDIX E

Attachment 1
Notice and Petition
of Cable News
Network, Inc.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GENERAL WILLIAM C. WESTMORELAND,
Plaintiff,

v.

CBS INC., *et al.*,
Defendants.

Civil Action
No. 82 Civ. 7913 (PNL)

PROCEDURAL GUIDELINES GOVERNING COMPREHENSIVE COVERAGE OF THE TRIAL IN THIS CASE

The following Guidelines are adopted for the audio and visual coverage of the trial of this case, upon special waiver of Local Rule 7. These Guidelines are drawn from procedural rules developed in Florida and other states following pilot and experimental programs. They are intended for application only in this case to serve the public interest, to assist the Court, and to enhance the information available to a committee of the Judicial Conference of the United States in its review of a petition to amend Canon 3A(7) of the Code of Judicial Conduct for the United States Courts.

GUIDELINES

I. Plenary Power of the Court in This Experiment

1.01. Sole and plenary power to control all facets of experimental audio and visual coverage of the trial in this case rests with the Court. It may withdraw permission for such coverage, or it may interrupt or modify that coverage at any time. Nothing set forth in these Guidelines shall affect the Court's control of the conduct of trial proceedings. None of its decisions under these rules is appealable.

1.02. **Nature and Term of the Experiment.**

In consideration of waiver of Local Rule 7, the media petition concerning audio and visual coverage of trials now pending before the Judicial Conference, the extensive experimentation and use of such coverage in state courts throughout the country, the consent of the parties herein, and upon agreement to the terms of these Guidelines by all participating media, the Court will permit experimental audio and visual coverage of trial proceedings in this case as set forth below. These guidelines govern that experimental coverage; they do not affect media coverage which is otherwise permissible under Local Rule 7 and Canon 3A(7) of the Code of Judicial Conduct for the United States Courts. The experimental coverage permitted hereunder is confined to formal proceedings in the courtroom, limited as set forth below.

II. Media Cooperation

2.01. The Court will appoint a representative of the media to be electronic media coordinator for this experimental coverage. All television and radio coverage will be pooled to those requesting access under pool

guidelines and the electronic media coordinator shall make the audio and video signals available to participating media on a pro-rata cost basis.

2.02. Still photographic coverage will also be pooled through a media coordinator to be appointed by the Court. Pool photographs will also be made available to participating media on a pro-rata cost basis.

2.03. In order to participate in the experimental coverage, each media entity must comply with these Guidelines and any pertinent orders of the Court.

III. Technical Guidelines and Rules of Operation

3.01. **Subjects of Coverage**

There shall be no audio pickup of communications between attorneys and clients, conferences at the bench, or other *sotto voce* conferences among counsel or the parties; and any work papers or materials of the Court, counsel, or the parties shall not be shown so as to be legible.

3.02. **Placement and Conduct of Equipment and Personnel**

a. One television camera as described below, operated by one person, will be permitted in the courtroom at a location approved by the Court. Any wires and related components which must be located in the courtroom shall be hidden to the greatest extent possible. All other equipment shall be located outside the courtroom. Equipment shall not inhibit in any manner the movements of trial participants.

b. One still photographer, using no more than two

still cameras with no more than two lenses for each camera and related equipment as described below, will be permitted in the courtroom at a location approved by the Court.

c. The media will be permitted the opportunity to connect with the courtroom audio system. The connection will be the minimum necessary to provide a single audio source for television and radio. A technician will be permitted in the courtroom at a location approved by the Court as necessary to assure the audio control required by these Guidelines. Directional microphones or a substitute audio system may be used as necessary upon approval of the Court.

d. Only equipment which does not produce distracting sound or light may be employed. The wattage of courtroom light sources may be enhanced upon advance approval from the Court. Such enhancements will not be permitted if they produce any distracting light; and they shall be installed and maintained without public expense.

e. The television camera and still photographer shall be located in the courtroom according to the diagram appended to the Petition as Attachment 2. Operating personnel shall not act in any manner which would attract attention to the coverage or otherwise distract the trial participants. Personnel and equipment shall not be moved at any time during trial proceedings; film and tape shall not be changed within the courtroom while the Court is in session. Equipment and clothing of personnel shall not carry any visible logo or emblem identifying or advertising media entities.

f. All physical arrangements and placement of per-

sonnel within the courtroom shall be accomplished more than fifteen minutes before the commencement of trial proceedings. All personnel shall be in their places by that time. Equipment and personnel may be removed from the courtroom only during recesses and at the end of the day.

g. To the greatest extent practicable, all equipment not required to be located in the courtroom shall be located elsewhere in the courthouse or beyond. Any arrangements for use of space in the courthouse for such equipment must be proposed and approved in advance by the Court. Approval will not be given if the proposed usage would interfere with the decorum and official use of the courthouse.

3.03. **Equipment Requirements**

a. The television camera shall be a tripod-mounted electronic newsgathering (ENG) camera which emits no distracting sound nor light.

b. The still photographic equipment shall be of a silent-shutter type which emits no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera.

IV. Use of Products of Coverage

4.01. **In This Case**

None of the products of coverage permitted under these Guidelines may be used or referred to in any manner during the trial or subsequent proceedings in this case.

4.02. **Within the Courthouse**

None of the products of the coverage under these guidelines may be displayed within the courthouse during the trial, except as necessary in a media monitoring and press room at a location designated by the Court.

4.03. **Beyond the Courthouse**

These Guidelines do not limit the use which is made of the coverage under these Guidelines beyond the courthouse and its environs.

V. Review of This Experiment

5.01. **Tape-Copy Availability**

CNN shall make available for information, study and academic purposes tape-copies of its coverage, as directed by the Judicial Conference.

5.02. **Subsequent Evaluation**

If and as the Court should so request, CNN is willing to participate in post-trial evaluation of the coverage permitted under these Guidelines.

APPROVED:

The Court

_____ _____

Date United States District Judge

APPENDIX F

Attachment 4
Notice and Petition
of Cable News Network, Inc.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GENERAL WILLIAM C. WESTMORELAND,
Plaintiff,

v.

CBS INC., *et al.*,
Defendants.

Civil Action
No.82 Civ. 7913 (PNL)

CONSENT OF THE PARTIES

CAPITAL LEGAL FOUNDATION

August 7, 1984

Honorable Pierre N. Leval
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, NY 10007

Re: *Westmoreland v. CBS*
82 Civ. 7913 (PNL)

Dear Judge Leval:

I am writing to advise the Court that counsel for Cable News Network have provided us with a copy of its petition to permit television coverage of the above-captioned case. We have reviewed the petition and I have discussed the matter with General Westmoreland. General Westmoreland endorses the petition.

Sincerely,
Dan M. Burt

CBS

Dear Mr. Ross: August 6, 1984

This is in response to your request for the consent of CBS Inc. to live television coverage of the trial in *Westmoreland v. CBS*. While Local Rule 7 of the rules of the United States District Court for the Southern District of New York prohibits such coverage, we understand that CNN intends to ask the Court in the *Westmoreland* case for a waiver of that Rule.

CBS has long been on record as favoring electronic coverage of Federal court proceedings. Since CBS would not object to the electronic coverage of any trial, it would not object to such coverage of a trial of the *Westmoreland* case, should one ultimately take place.

We note, however, that Canon 3A(7) of the Code of Judicial Conduct, as adopted by the Judicial Conference of the United States, also bars electronic coverage of Federal court proceedings and would thus appear to prevent the Court in the *Westmoreland* case from acting favorably on CNN's request. As you are aware, 28 media organizations, including CBS and CNN, have filed a petition with the Judicial Conference to amend Canon 3A(7) to permit electronic coverage in all federal trial and appellate proceedings.

That petition is now being considered by an ad hoc committee. We understand that the committee will soon conclude its

work and that the Judicial Conference itself will act on the petition at its meeting in September. Thus, we suggest that the most effective course to follow in securing the right of electronic coverage in Federal court proceedings would be to await the Judicial Conference's determination concerning the petition before making any application to the trial judge in the *Westmoreland* case.

As we have discussed, I have spoken to David Boies regarding the position of the individual defendants in the *Westmoreland* case, and he has advised me that none of the individual defendants will object.

Very truly yours,

s/George Vradenburg III

Robert W. Ross, Esq.
Vice President & General Counsel
Turner Broadcasting System, Inc.
1140 Connecticut Avenue, NW
Suite 1006
Washington, DC 20036

cc Stuart Pierson, Esquire
William Kennard, Esquire
Vernor, Liipfert, Bernhard & McPherson
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Washington, DC 20036

APPENDIX G

28 U.S.C. SECTION 331 PROVIDES AS FOLLOWS:

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, a district judge from each judicial circuit, and two bankruptcy judges to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.

The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the circuit and district judges of the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the circuit and district judges in the second, fifth, and eighth circuits shall choose a district judge to serve for two years and the circuit and district judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years. The bankruptcy judges to be summoned shall be chosen at large by all the bankruptcy judges. Each bankruptcy judge chosen shall serve as a member of the conference for three successive years, except that in the year following the effective date of this sentence the bankruptcy judges shall choose one bankruptcy judge to serve for two years.

If the chief judge of any circuit or the district judge chosen by the judges of the circuit or a bankruptcy judge chosen by the bankruptcy judges is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit or any other bankruptcy judge. Every judge summoned shall

attend and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law.

Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Attorney General shall, upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

APPENDIX H

28 U.S.C. SECTION 2071 PROVIDES AS FOLLOWS:

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

APPENDIX I

28 U.S.C. SECTION 2072 PROVIDES AS FOLLOWS:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime case, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

APPENDIX J

RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE PROVIDES:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

APPENDIX K

CANON 3A(7) OF THE CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES PROVIDES:

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

a. The use of electronic or photographic means for the presentation of evidence, or for the perpetuation of a record; and

b. The broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

APPENDIX L

RESOLUTION G OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1962) PROVIDES:

> RESOLVED, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.

APPENDIX M

RECOMMENDATION D OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1980) PROVIDES:

It is recommended that each United States District Court adopt a rule of court providing in substance as follows:

> The taking of photographs and operation of tape recorders in the courtroom or its environs, and radio or television broadcasting from the courtroom or its environs during the progress of or in connection with judicial proceedings, including proceedings before a United States Magistrate, whether or not court is actually in session, is prohibited. A judge may, however, permit (1) the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record, and (2) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

87 F.R.D. 518, 535 (1980).

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 84-7809

GENERAL WILLIAM C. WESTMORELAND,
Plaintiff,

v.

CBS, INC., *et al.*,
Defendants.

CABLE NEWS NETWORK, INC.,
Appellant.

IN RE WAIVER OF LOCAL RULE 7 TO PERMIT AUDIO-VISUAL COVERAGE OF THE TRIAL IN General William C. Westmoreland v. *CBS, Inc., et al.*

On Appeal From The
United States District Court
For The Southern District of New York

October 19, 1984

APPEARANCES:
HON. JAMES L. OAKES, Presiding Judge
HON. RALPH K. WINTER
HON. T. EMMETT CLARIE

RUDOLPH W. GIULIANI, ESQ.,
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EXERPTS FROM PROCEEDINGS

MR. TRIBE: May it please the Court: Nearly two decades ago, Justice Harlan predicted in—excuse me, I would like to reserve about five minutes for rebuttal, if I might.

JUDGE OAKES: All right, Mr. Tribe.

MR. TRIBE: It was about twenty years ago that Justice Harlan, in the Estes case, predicted that the day may come when television will have become so commonplace as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.

Now, this case does not raise the question of whether that day, as a general matter, has yet arrived. But in this case, Judge Leval having begun what he candidly called an assumption that cameras would turn trials into vaudeville, ultimately concluded that for this trial, where the parties supported coverage, and in light of the special circumstances, the day Justice Harlan prophesized had indeed arrived.

Nonetheless, the District Court decided that it was absolutely bound by the rules of the Southern District and of the Judicial Conference to forbid comprehensive television of this trial, despite its own findings and the parties' wishes.

In short, the District Court treated the rules at issue as embodying an irrebuttable presumption that telecasting any Federal trial in the Southern District would interfere with the proper administration of justice. But we are here to ask this Court to reverse that decision and to hold that the District Court has discretion to act in accord with its own findings in this case under appropriate appellate supervision, and we advance to that end two principal arguments.

First, that if it is read as inflexibly as the District Court read them, the rules would exceed the authority delegated by Congress to the Federal judiciary; and, second, that the First and Fifth Amendments would, in any event, forbid Congress from promulgating either directly or indirectly through the judiciary so sweeping a per se ban on the telecasting of all Federal civil trials.

Now, first, as to congressional authority, I think it would be helpful to recall that when the United States Supreme Court addressed the right of Warner Communications to copy and broadcast to the public the Watergate tapes played in the jury trial of President Nixon's former advisers, the Court had no doubt, nor did the parties, that there was a common law right of access ordinarily entrusted, as the Court put it, to the sound discretion of the trial court to exercise in light of the facts and circumstances of the particular case.

And as the Supreme Court made clear, the exercise of such discretion to permit direct access was supported by weighty considerations, considerations of the, as the Court put it, the citizens' desire to keep a watchful eye on the workings of public agencies, and the Court thought it particularly important that it was a trial about an immensely significant historical occurrence, but in that case there was a decisive feature absent here, namely, as the Court held, the trial court's discretion to grant access had been expressly superseded by the Presidential Recordings Act, in which Congress had struck its own balance in a manner explicit enough to be decisive against the claim for trial court discretion.

Now, in this Circuit, as in both others, it had ABSCAM trials, and again it was the absence of directly controlling congressional legislation that was thought to leave the access issue in the case by case discretion of the trial judge.

It is our position that even if the Congress could constitutionally cut off trial court discretion with respect to live television access to this trial about an alleged coverup of the details of the strength of the enemy in Vietnam, one thing is quite clear, and that is Congress has not done so. What we have is the generic delegation of rulemaking power in 28 U.S. Code 2071 and 2072.

JUDGE OAKES: The power to prescribe rules for the conduct of their business.

MR. TRIBE: That's correct, Your Honor, but not rules which make substantive law in the form of rules, of course, something this Circuit recognized as to Section 2071 back in 1932 in Woodbury v. Jergens.

Now, it is our position that a little could be more substantive in terms of that survival than to cut off nationwide live access to an open trial about the Vietnam war in the face of the trial court's express finding that there is no procedural or institutional reason here to do so, and that, on the contrary, the

interests of the administration of justice would be advanced by doing so.

So we don't doubt that under the delegation from Congress the Federal judiciary has the power to promulgate a presumption against telecasting subject to the First Amendment arguments that we want to advance. What we do doubt is that a per se flat ban applicable, regardless of circumstances—

JUDGE OAKES: No doubt but that the local rule says that it shall be prohibited, period.

MR. TRIBE: That's right, the local rule—

JUDGE OAKES: That doesn't leave it in the discretion of the judge to prohibit it.

MR. TRIBE: If you read it as literally as that, we say it is beyond the authority delegated by Congress. Of course, any rule put that flatly has been construed, when they are rules for the conduct of business, as allowing an exception, so this Court could say, despite the flat language, that it will avoid the Enabling Act issue by construing the rule as more discretionary, and I would suggest that, quite apart from the Enabling Act, which would leave Congress free explicitly to say that it does not want television coverage of any trial, apart from that there is a First Amendment problem with any such flat ban, even if we assume that Congress contemplated—

JUDGE WINTER: (inaudible)

MR. TRIBE: Well, we are not talking about the *Guaranty* test of substance procedure under *Erie* alone, Judge Winter. We are talking about the question of whether, when the procedural purposes of the rules are found by the trial court to be satisfied, whether the impact on the substantive background common law right of access isn't beyond what Congress intended to delegate.

Now, if there were no Fifth Amendment problem at all, I suppose the argument would be harder to make with great force, but it is reinforced by a powerful set of First Amendment

considerations. That is the argument for case-by-case discretion by a trial court where the parties support live coverage.

***

APPENDIX O

TEXTS OF THE PUBLIC STATEMENTS ISSUED UPON THE STIPULATED DISMISSAL OF *WESTMORELAND V. CBS, ET AL.*

Joint Statement

General William C. Westmoreland and CBS today jointly announced the discontinuance of the Westmoreland suit against CBS, Mike Wallace, George Crile and Sam Adams.

The suit pertained to a CBS News broadcast "The Uncounted Enemy: A Vietnam Deception," broadcast on January 23, 1982.

The matters treated in that broadcast—and the broadcast itself—have been extensively examined over the past two and a half years both in discovery and then through documents and witnesses presented by both sides in Federal Court.

Historians will long consider this and other matters related to the war in Vietnam. Both parties trust their actions have broadened the public record on this matter.

Now both General Westmoreland and CBS believe that their respective positions have been effectively placed before the public for its consideration and that continuing the legal process at this stage would serve no further purpose.

CBS respects General Westmoreland's long and faithful service to his country and never intended to assert, and does not believe, that General Westmoreland was unpatriotic or disloyal in performing his duties as he saw them.

General Westmoreland respects the long and distinguished journalistic tradition of CBS and the rights of journalists to

examine the complex issues of Vietnam and to present perspectives contrary to his own.

CBS Statement

First of all, CBS would like to express its appreciation to the jury for its unstinting attention over the past several months, and to Judge Pierre Leval, for the authority and impartiality that characterized his handling of this case.

We also want to express our admiration and respect for the many current and former military and civilian Government officials who came forward at great personal and professional cost to support the broadcast.

We regret that General Westmoreland and his supporters felt compelled to bring the suit. We feel now, as we did three years ago, that this issue should never have been brought to the court.

The complex and controversial issues of the Vietnam War are more appropriate to ongoing public inquiry and debate than to judicial determination.

Three years ago, CBS News broadcast "The Uncounted Enemy: A Vietnam Deception," which reported charges that General Westmoreland and his command misled the public, the Congress and the President, about enemy troop strength to advance the political argument that the war was being won.

Since then, the CBS News documentary has been subjected to perhaps the most intensive scrutiny ever brought to bear on a journalistic effort. CBS News conducted its own internal examination of the broadcast two and a half years ago. It concluded that the broadcast was accurate and that minor procedural violations of CBS News standards in no way compromised the editorial integrity of the broadcast.

Nothing has surfaced in the discovery and trial process now concluded that in any way diminishes our conviction that the

broadcast was fair and accurate, and that it was a valuable contribution to the ongoing study of the Vietnam era.

We continue to stand by the broadcast and are pleased that General Westmoreland has withdrawn his legal challenge to it.

With this legal matter concluded, Mike Wallace will return to "60 Minutes." George Crile will rejoin the documentary unit as a producer.

We have enjoyed our relationship with defense counsel David Boies and his colleagues. One could not ask for better representation.

We also appreciate the contributions of Sam Adams to the broadcast and its defense.

In conclusion, this experience has further strengthened the CBS News commitment to vigorous, fair and impartial journalism. It is a fundamental principle of CBS that the journalistic process not be limited or intimidated by those seeking to constrain free inquiry and debate and the dissemination of information.

We believe this experience has advanced that principle.

Westmoreland Statement

From the joint statement issued by General Westmoreland and CBS, I quote, "CBS respects General Westmoreland's long and faithful service to his country and never intended to assert, and does not believe, that General Westmoreland was unpatriotic or disloyal in performing his duties as he saw them."

If that statement had been made after the CBS program was aired, it would have satisfied me.

After my press conference in Washington three days after the broadcast, it would have satisfied me.

After the publication of the TV Guide article, it would have satisfied me.

If made after the publication of the book "A Matter of Honor," it would have satisfied me.

If made during the first days in Federal Court, it would have ended the episode.

The court action has certainly exposed some of the problems and complexities of producing intelligence on an elusive enemy.

The court action has certainly exposed some of the problems and complexities of producing a television documentary.

Indeed, the court action has emphasized:

1. The enemy's Tet offensive was a severe defeat.

2. The scope of the enemy's offensive did exceed expectation.

3. The size of the enemy troops committed was in line with the estimates of my intelligence chief, General Davidson.

4. Our American troops did an impressive job in fighting the enemy forces in South Vietnam, and did not lose a battle of significance.

I hope and trust that the conclusion of my action against CBS will be a benchmark in putting our Vietnam experience behind us and allow historians and scholars to assess the facts of that war in accurate and nonsensational terms.

I brought this suit against CBS to defend my honor and to affirm constitutional principles, which include the rights provided by the First Amendment.

New York Times, February 19, 1985 at B-6.

APPENDIX P

Supreme Court of the United States

No. A-529

CABLE NEWS NETWORK, INC.,
Petitioner,
v.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 2, 1985.

/s/ Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 10th
day of January, 1985

Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1377

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CABLE NEWS NETWORK, INC.,
Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK and
THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1377

CABLE NEWS NETWORK, INC.,
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THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK and
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

Petitioner, Cable News Network, Inc. ("CNN"), seeks to extrapolate a First Amendment right to televise judicial proceedings from this Court's holding that the public and the press have a First Amendment right to attend criminal trials in person. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The trial that CNN sought to televise—*Westmoreland v. CBS, Inc.*—was open to the public and the press and received extraordinary publicity throughout; indeed, half the courtroom was given over to the press. Nonetheless, CNN

claims that the First Amendment was violated because exclusion of television cameras pursuant to court rule [1] deprived the public of "the instantaneous access to reality that only live audio-visual coverage can provide." Pet. 12. For the reasons set forth below, there are no special or important reasons to grant certiorari, and the petition therefore should be denied.

The decision below, now reported at 752 F.2d 16, is clearly correct under the precedents of this Court. This Court first addressed electronic coverage of trials in *Estes v. Texas*, 381 U.S. 532 (1965), rejecting a claimed "right . . . to televise from the courtroom" as "a misconception of the rights of the press." *Id.* at 539. *See also Gannett Co. v. DePasquale*, 443 U.S. 368, 381 (1979) (*Estes* "reject[ed] the claim that the media representatives had a constitutional right to televise the trial"). Citing *Estes*, the Court held in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978), that "there is no constitutional right to have [live witness] testimony recorded and broadcast." [2] The Term after *Richmond Newspapers* established the First Amendment right of the public and the press to attend trials in person, the Court held in *Chandler v. Florida*, 449 U.S. 560 (1981), that a state may *permit* telecasting of trials as a procedural experiment. First, however, the Court carefully reiterated "our holding in *Nixon v. Warner Communications, Inc.*" and emphasized that Florida's experiment with telecasts did not rest upon "any constitutional imperative." *Id.* at 569-70. *See also id.* at 589 (White, J.,

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[1] The court rule in question is General Rule 7 of the United States District Court for the Southern and Eastern Districts of New York. Most federal district courts have similar rules, *see* Pet. 4 n.2, and Canon 3A(7) of the Code of Judicial Conduct for United States Judges applies to all federal judges.

[2] *Warner Communications* assumed that "public understanding . . . remains incomplete" in the absence of electronic coverage. 435 U.S. at 610. Thus, the Court already has ruled specifically that there is no constitutional significance to the "instantaneous access to reality" trumpeted by CNN.

concurring in the judgment) (state may "forbi[d] cameras in its courtrooms in any criminal case"). With this clear guidance, the Second Circuit plainly would have erred had it accepted CNN's First Amendment claim.

The holding of the Second Circuit also is consistent with every other federal case to consider telecasting of trials and related questions. *See, e.g., United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir.), *cert. denied*, 103 S. Ct. 2094 (1983); *Combined Communications Corp. v. Finesilver*, 672 F.2d 818, 821 (10th Cir. 1982); *Dorfman v. Meiszner*, 430 F.2d 558, 562 (7th Cir. 1970); *United States v. Yonkers Board of Education*, 587 F. Supp. 51, 53 (S.D.N.Y.), *aff'd*, 747 F.2d 111 (2d Cir. 1984). CNN advances no claim of conflict.

The insubstantiality of the petition is underscored by its failure to come to grips with *Chandler*, a peculiarly relevant case postdating *Richmond Newspapers* but only mentioned in passing in the petition. Pet. 8, 10 n.13. In *Chandler*, the Court was obliged to give plenary consideration to the question whether a state could constitutionally permit telecasting of a trial, a question that would have been frivolous had *Richmond Newspapers* established a right to telecast. The Court in *Chandler* emphasized that electronic coverage of trials is an "experiment" in which "[d]angers lurk." 449 U.S. at 582. It is inconceivable that the potentially dangerous experiment considered in *Chandler* somehow has evolved into a constitutional requirement during the four short Terms since *Chandler*.

As noted in *Chandler*, the telecasting of trials has been the subject of sharp debate because of "the difficult and sensitive question of the potential psychological prejudice" to the judicial function of finding the truth in each case under the law and on the facts of record. 449 U.S. at 575. Less than a year ago, the Report of the Judicial Conference Ad Hoc Committee on Cameras in the Court-

room (Sept. 6, 1984) stated that seventy-eight percent of 600 active and senior federal judges and eighty-four percent of 636 members of the American College of Trial Lawyers oppose the telecasting of trials because of the perceived adverse influences on jurors, witnesses, lawyers, and judges, the diversion of judicial time into technological supervision, and the threat to the solemnity of judicial proceedings. Noting that the "primary function of a court is to administer justice in resolving disputes" and that "[i]ntroduction of cameras into the courtroom risks the transformation of judicial proceedings into media events and jeopardizes . . . the search for truth" (Report at 7, 9), the Ad Hoc Committee recommended denial of a media petition that would have required television access to federal courtrooms.

Little imagination is required to envision the effect of television at a trial such as that involving the Chicago Seven. *See United States v. Seale*, 461 F.2d 345 (7th Cir. 1972). CNN, of course, posits that *Westmoreland v. CBS, Inc.* presented a paradigm case for telecasting because of the consent of the parties and the willingness of the judge. But while repeatedly proclaiming the unobtrusiveness of television, the instant petition is suffused with evidence to the contrary. In the broadcaster's eyes, *Westmoreland v. CBS, Inc.* was less a judicial proceeding dedicated to detached truthfinding than a "test of 'the best and the brightest' in the crucible of trial examination" and "history in the making." Pet. 21. To the parties and witnesses, telecasting offered the prospect, not of enhancing truthfinding in a detached judicial setting, but rather of gratifying the desire "to reach the largest possible national audience in order to vindicate their respective versions of the truth." Pet. 22. Even the trial judge seemed affected by the eye of the camera, declaring that telecasting of the trial "is more important than its decision" because "historians and commentators on the war and on the press will not accept the verdict of the

jury and the rulings of the judge as definitive answers." Pet. App. 25. Without television, the judicial proceeding concluded with a settlement; had television provided a national soapbox, the trial might well have exceeded its natural life span even if jurors, witnesses, lawyers, and judge had resisted the temptation to "stray . . . from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance.'" *Estes v. Texas*, 381 U.S. at 591 (Harlan, J., concurring).

In summary, the decision of the Second Circuit is consistent with the decisions of this Court and of the other courts to consider this question. Thus, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 24, 1985

(3)

Office - Supreme Court, U
FILED
JUN 7 1985
ALEXANDER L. STEVA
CLERK

No. 84-1377.

IN THE
Supreme Court of the United States

October Term, 1984

CABLE NEWS NETWORK, INC.

Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK AND
THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF

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Constitutional Provisions.

First Amendment of the United States Constitution passim

Statutes.

28 U.S.C. § 2072 5

No. 84-1377.

IN THE

Supreme Court of the United States

October Term, 1984

CABLE NEWS NETWORK, INC.

Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK AND
THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF

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1. The Brief in Opposition attacks an argument that Petitioner does not make. Respondents' entire brief depends on the unstated premise that CNN claims an absolute "First Amendment right to televise judicial proceedings." Brief in Opposition ("Br. Opp.") at 1. Respondents further attribute to CNN the view that *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), makes the telecasting of trials "a constitutional requirement." (Br. Opp. 3). Petitioner argues nothing of the kind.

2. By suggesting that granting certiorari in this case would amount to a declaration that such recent precedents as *Chandler* v. *Florida*, 449 U.S. 560 (1981), addressed only "frivolous" questions (Br. Opp. 3), Respondents both underestimate this Court and overestimate the precedential value Petitioner would attribute to *Richmond Newspapers*. The due process issues disposed of in *Chandler* would remain serious even if Petitioner were to prevail here. And the argument that *Richmond Newspapers* itself *already* "established a right to telecast" trials (Br. Opp. 3) is one Petitioner does not advance. The court below held that the First Amendment right to observe trials is not even *implicated* when observation is sought by means other than physical attendance. Petitioner contends only that, by so holding, the Second Circuit both *anachronized* the access right established by *Richmond Newspapers* and its progeny, by forcing that right into the procrustean bed of nineteenth century technology, and *trivialized* that right by limiting it to the right of a handful of citizens to squeeze into the back of a crowded courtroom. It is Petitioner's position *not* that *Richmond Newspapers* settled a general right to television access, but that the existence of such a right in particular cases cannot, despite the Second Circuit's contrary view, be categorically denied; that the existence of a qualified right of audio-visual access poses questions of sufficient moment to require this Court's plenary attention; and that this case is the ideal vehicle for such consideration.

3. The Opposition Brief, by its conspicuous silence on the matter, tacitly concedes that the flat and unlimited administrative ban on audio-visual access endorsed by the judgment below conflicts with this Court's prior holding that "a mandatory [exclusion] rule, requiring no particularized determination in individual cases, is unconstitutional," even where the rule leaves most of the affected trial open to public observers. *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 611 n.27 (1982). *See* Petition for Certiorari ("Pet.") at 25. Just as this Court has uniformly required a case-by-case determination

to accommodate the public's right to observe trials with the integrity and solemnity of the judicial process,[1] so regulation of particular means of providing the public with access — whether by physical attendance, through artists' sketches, or through discreet videotaping — requires the same careful tailoring in each case.[2]

4. Respondents' musings on the perils audio-visual coverage poses to judicial fairness and decorum are supported by little beyond the quotation of dicta penned decades ago when the medium was new and its technology clumsy. But even *Chandler*, the recent case that Respondents deem "peculiarly relevant" (Br. Opp. 3), recognized that there is no *necessary* antagonism between broadcast coverage and the judicial search for truth. 449 U.S. 575-79. Specifically, the *Chandler* Court rejected the notion that broadcast coverage and the resultant publicity are automatically in tension with judicial decorum and integrity and thus with fairness. *Id.* at 574-575. For *Chandler* expressly repudiated a *per se* rule that "broadcast coverage . . . is a denial of due process," *id.* at 574, and held instead that "the appropriate safeguard against such prejudice" is the litigants' right to show that "their trial was affected adversely

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[1] *See, e.g., Press-Enterprise Co.* v. *Superior Court*, 104 S.Ct. 819, 824, 826 (1984); *Chandler* v. *Florida*, *supra*, 449 U.S. at 574-575; *Richmond Newspapers*, *supra*, 448 U.S. at 580-581. *See also* Pet. at 25-26 n.36.

[2] Respect for First Amendment concerns has been held to require district courts to make particularized findings of harm to the judicial process before prohibiting attendance only by the general public — while admitting the press — during sensitive testimony, *Douglas* v. *Wainwright*, 739 F.2d 531 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 1170 (1985); before categorically barring post-verdict interviews of jurors, *In re Express News Corp.*, 695 F.2d 807 (5th Cir. 1982); before banning verbatim notetaking, *United States* v. *Cabra*, 622 F.2d 182 (5th Cir. 1980); and before banning sketching either in or out of the courtroom, *United States* v. *Columbia Broadcasting System*, 497 F.2d 102 (5th Cir. 1974). Contrary to Respondents' mistaken assertion (Br. Opp. 3), CNN indeed contends in its petition that the judgment below is in conflict with these decisions of other courts of appeals. *See* Pet. at 25-26 n.36.

by the impact on any of the participants of the presence of cameras and the prospect of broadcast." *Id.* at 575, 581.

5. In this regard, the Brief in Opposition simply ignores the careful findings of the trial judge below — findings not questioned by the Court of Appeals — that Petitioner's proposed coverage would in fact *enhance*, rather than disrupt or prejudice, the course of justice in the instant case. (Pet. 6, 16, 23). That the district judge reached this conclusion despite a self-confessed initial distaste for television as a low-brow, vaudeville medium (Pet. 6) belies the crude effort of the Brief in Opposition to depict this district judge as eager to "'plum[e himself] for a satisfactory television performance'" (Br. Opp. 5). Under the guidelines approved by the district court and assumed to be adequate even by the Second Circuit (Pet. 8), the district judge would hold plenary power to control all aspects of the coverage precisely to avert subversion of the judicial process before it could occur.

6. Were it not for Respondents' extraordinary suggestion to the contrary (Pet. Opp. 4), it would go without saying that constitutional questions are not to be resolved by plebiscites. The *general* scope and meaning of the First Amendment right of trial access should be determined not by polls of judges or attorneys, but by this Court as steward of the Constitution. Similarly, the propriety of audio-visual taping or live coverage of a *particular* trial should be determined by the judge presiding over that trial, subject to appropriate appellate review — not by a referendum of his or her judicial peers. The Opposition Brief offers no reason why the historic duties of this Court in expounding the Constitution, and the traditional prerogatives of district judges in controlling their own courtrooms, should give way in this case to mere opinion surveys of the sort Respondents cite.

7. In their haste to set up a *constitutional* straw man which Petitioner does not in fact put forth, Respondents utterly fail

to challenge the second, purely *statutory* ground for granting certiorari — that the judgment below improperly allows a *per se* rule not promulgated or even contemplated by Congress to override the evolving common law substantive right of physical and electronic access to trial records and testimony expressly recognized in *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589 (1978). *See* Pet. 26-29. The Second Circuit has thus endorsed a flagrant violation of the Rules Enabling Act, the very legislation pursuant to which the flat ban in General Rule 7 was promulgated. 28 U.S.C. § 2072. This alone is sufficient to warrant plenary review by this Court.

8. Respondents' attempt to depict the issues presented here as insubstantial and previously decided flies in the face of this Court's explicit recognition in *Chandler* that this "area [is] charged with constitutional nuances," 449 U.S. at 572-73. As both courts below conceded, and as Respondents do not deny, the *Westmoreland* trial presents the "paradigm case" for considering the scope of the First Amendment right to observe trials. That other trials might be less well suited to the presence of television for current viewing or for historic preservation — a point Respondents make with some fanfare (Br. Opp.4) — would be relevant only if Petitioner were urging an absolute

or automatic right to televise *all* trials, something CNN has never advocated. For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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